

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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XPERTUNIVERSE, INC., : CIVIL ACTION
Plaintiff, :
vs. :
CISCO SYSTEMS, INC., :
Defendant. : NO. 09-157 (RGA)

- - -

Wilmington, Delaware
Tuesday, March 5, 2013
9:04 o'clock, a.m.

- - -

BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

- - -

APPEARANCES:

POTTER, ANDERSON & CORROON LLP
BY: PHILIP A. ROVNER, ESQ.

-and-

Valerie J. Gunning
Leonard A. Dibbs
Official Court Reporters

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P R O C E E D I N G S

Mason - direct

1

2

(Proceedings commenced in the courtroom,

3

beginning at 9:04 a.m.)

4

5

THE COURT: Good morning. And please be seated.

6

MR. CANTINE: Good morning.

7

MR. ROVNER: Good morning.

8

THE COURT: So I imagine, unless someone tells

9

me something else, that the first order of business this

10

morning is to hear Mr. Mason?

11

MR. CANTINE: That's right.

12

THE COURT: All right. Mr. Cantine?

13

MR. CANTINE: Good morning, your Honor. I'd

14

like to call Mr. Rick Mason to the stand, please.

15

PLAINTIFF'S TESTIMONY

16

... RICHARD WIDDER MASON, having been

17

duly sworn as a witness, was examined and

18

testified as follows...

19

THE COURT: Mr. Cantine?

20

MR. CANTINE: Thank you, your Honor.

21

DIRECT EXAMINATION

22

BY MR. CANTINE:

23

Q. Mr. Mason, have you ever testified in court before?

24

A. No, I have not.

25

Q. Okay. Can you tell the Judge what it is you do for a

Mason - direct

1 living?

2 A. I have a computer consulting business, databases,
3 programming, build computer apps for the iPhone and the
4 Android.

5 Q. And where did you go to college?

6 A. I went to Queens College, undergraduate, and I have
7 graduate work done at Rochester Institute of Technology,
8 when I worked for Xerox up in Rochester, New York.

9 Q. And what was your degree in?

10 A. Computer science.

11 Q. And what year was that?

12 A. That would have been 1973.

13 Q. And could you please generally just tell us about your
14 work experience before XpertUniverse?

15 A. I first started working at Xerox Corporation,
16 programming, operating systems, built special fax machines
17 for Xerox, and then worked for the Xerox retail marketing
18 office and build back end applications, financial systems
19 for Xerox. Worked for the corporate headquarters at Xerox
20 as the director of the computer division there.

21 And then from there I went to SoftScript
22 International, which is a barcode, two dimensional barcoding
23 company, where we developed a unique type of optical scanner
24 and a way to print barcodes.

25 From SoftScript International I went to Comtex

Mason - direct

1 Scientific, a news and information refinery, where we
2 provided news to the Bloombergs and the stock markets, and
3 we analyzed news feeds from around the world and provided
4 tem to the stock market area. Got deeply involved in
5 America Online at that time.

6 From Comtex I went to Ogelvy & Mather, where
7 I was Vice President of the Ogelvy & Mather Marketing
8 Department. And we put American Express online for the
9 first -- it was the first time American Express actually
10 went online. It was one of the largest online initiatives
11 and that was done in the early nineties, just after the web,
12 or the Internet became viable.

13 We did that through America Online and worked on
14 providing getting American Express' back end data systems
15 down in Phoenix, Arizona, making it possible that people
16 could look at their bill online.

17 From there I left Ogelvy & Mather and started
18 another computer consulting firm called Blink Online
19 Publishing, at which time I became -- we developed websites,
20 did database programming, much of what I'm doing again
21 today. Did a lot of training work specifically in the
22 computer science areas and went to -- one of our big clients
23 was Computer Generated Solutions, which led into the
24 business of working with XpertUniverse.

25 Q. Okay. And when did you start with XpertUniverse?

Mason - direct

1 A. That would have been the end of 1999, 2000.

2 Q. Okay. And what was your title when you started?

3 A. I'm pretty sure it was director of technology.

4 Q. And what were your responsibilities as director of
5 technology?

6 A. Well, we built algorithms. We did design work. I
7 managed the computer systems, put together the back end
8 computer room, built actually the network room with all the
9 computers, set up the desktops.

10 I was responsible for all backups at the company
11 and all policies relating to the -- all policies relating to
12 backups and developing our, what today would be called cloud
13 services. We had a document server we called QuickPlace and
14 I was responsible for working with IBM and installing that
15 in our computer room.

16 Q. And how long did you work at XpertUniverse?

17 A. I worked technically on salary through the end of
18 2006, and considered -- and continued consulting some time
19 into 2007.

20 Q. And during your tenure at XpertUniverse, did you have
21 an opportunity to work with Mr. Friedman, Victor Friedman?

22 A. Yes. I would say almost on a daily basis.

23 Q. And based on your experience of working with him and
24 your background, did you consider him a savvy computer
25 user?

Mason - direct

1 A. Not really. He understood computers, like most people
2 would today who would carry around an iPad or their
3 computer, but I would not call him particularly savvy when
4 it came to the technology of computers.

5 Q. Okay. And you indicated you were involved in backup
6 of computer systems at XpertUniverse; is that correct?

7 A. Yes.

8 Q. Okay. And you had personal knowledge of the backup
9 systems during the time you were there; right?

10 A. I did.

11 Q. And what was the practice when it came to backups at
12 XpertUniverse?

13 A. Well, from the get-go, when we started the company, we
14 decided procedurally -- we had a number of architects. We
15 decided that all of our business data would be stored in our
16 document server, which was called QuickPlace. And we
17 initiated tape backups every evening, rotating tapes on a
18 Monday, Tuesday, Wednesday, a daily schedule.

19 On Thursdays, I believe we did a full, or a
20 weekly backup, and we would take the tapes. They were
21 stored in a fireproof safe or in the network room, and then
22 once a week typically Victor would take one of the tapes
23 home with him so he would have it off-site in case of a
24 fire.

25 We also during that time as our Lotus Notes

Mason - direct

1 expanded for e-mail, we added a CVS server for our
2 programmers. That's a source code version control system,
3 CVS. We decided we were, as we were backing up that, we
4 needed larger tapes, so we bought a larger tape drive. We
5 had two different tape drives actually backing up on a daily
6 basis.

7 Q. Okay. You created a slide to kind of depict the
8 network?

9 A. I did.

10 MR. CANTINE: Before we do that, your Honor, may
11 I?

12 THE COURT: Sure, yes.

13 (Mr. Cantine handed slides to the Court.)

14 MR. CANTINE: May I give one to the witness,
15 too?

16 THE COURT: Yes.

17 (Mr. Cantine handed slides to the witness.)

18 MR. CANTINE: We can go to the next one.

19 BY MR. CANTINE:

20 Q. Okay. So it's a little hard to see on the screen, but
21 it's page 2 in your booklet.

22 What does this depict, sir?

23 A. Okay. This would be the, I'm sorry, the network
24 topology of our office. It would -- that dotted line is
25 loosely -- I actually developed this chart and put it out

Mason - direct

1 there.

2 The left side shows the corporate management.
3 The right side supposedly is developers and architects. The
4 only inference you could really draw from that is that
5 everyone was connected through a network backup, so when
6 they came to work, on their desktops or computer systems, we
7 were connected to the network.

8 Programmers on the right side were typically
9 connected to the CVS, system where they did their source
10 code work for the day. They would download the source code,
11 they would operate on a local computer, they would upload
12 any changes to the source code on the CVS system.

13 The Lotus Notes e-mail system was common to
14 everyone. Everyone used Lotus Notes for their e-mail. Any
15 other e-mail systems were only for personal use. It was
16 accepted practice in the company that everything went
17 through Lotus Notes from a business standpoint.

18 The QuickPlace document repository was available
19 for everyone. Anyone that operated on their computer and
20 wrote a business document would always, when it was
21 completed or when it was completed and ready to be passed
22 around, it would both be e-mailed and be stored in the
23 QuickPlace document server, and the document server would
24 automatically send an e-mail to the recipients, telling them
25 a new document was there, and you could probably -- should

Mason - direct

1 be able to see that in the Lotus Notes e-mail. Everything
2 was connected through Lotus Notes.

3 The common network directories over on the left
4 side there, that was used pretty extensively by the
5 corporate management. Anyone was able to use the common LAN
6 directory to put data up on there. We had our accounting
7 system there. And most of the corporate management, which
8 included not only Victor, Elizabeth Eiss, our president, Abe
9 Zelkin, the head of the technology department, David
10 Rutberg, who was I guess chief operations officer, but it
11 also included a few of the people that, like our chief, what
12 we called our librarian, and it included the secretary who
13 managed the financial operations.

14 Q. Okay. So just to make sure we understand this,
15 essentially, there were kind of three repositories, as I
16 would call it. You have QuickPlace, CVS, and then Lotus
17 Notes e-mail; is that right?

18 A. That is -- the three repositories were actually CVS,
19 which was the version of the system for source code.
20 QuickPlace document directory, where every business document
21 went by practice. Everyone used QuickPlace. The common
22 network directories were used extensively by the corporate
23 management. They may not have been used as much by the
24 programmers and the developers because they were downloading
25 things into their own special environments on their

Mason - direct

1 computers in order to do their programming code. And then
2 when they completed, they would upload to CVS. That's why
3 the dotted line was there, to show the corporate management
4 extensively used the network directory specifically.

5 Then below that, the idea is that all of those
6 repositories and/or network drives were backed up. We had
7 two different tape systems. One was a 4 millimeter DAC. I
8 believe it was a Sony tape drive system, but it didn't
9 matter. We probably had a couple over the years, and the
10 Formula Meter DAC tapes were good for I think 20 gigabytes
11 uncompressed, if I remember.

12 The Lotus Notes became pretty extensively --
13 extensive in size, along with the network directories that
14 our corporate management was using, so we ended up getting a
15 hundred gigabyte uncompressed. It was a special larger tape
16 drive known as an Ultrum type of drive. I can't remember
17 the brand we actually bought for that.

18 And these were all operated under a software
19 control program, which is now owned by Computer Associates,
20 called Arc Serve. It may have a different name today.

21 Q. All right. And when did XpertUniverse start doing
22 backups?

23 A. We started, I started doing backups from -- within
24 weeks of setting up the company, back in late -- in early
25 2000. Late 1999, early 2000.

Mason - direct

1 Q. And during the time you were at XpertUniverse, did
2 they ever stop doing backups?

3 A. Well, I was there, and even when I came in at the
4 beginning of 2007, I had trained -- I had shown whoever was
5 there how to actually make the tape backups and I understood
6 they were being done.

7 Q. Okay. And you described how the backup tapes were
8 stored. Some were saved. Some would go off-site on the
9 weekend to make sure you had two sets at any one time, one
10 off-site, one on site; is that right?

11 A. The off-site tapes would typically be the full backup
12 system sets. We did a full backup once a week. We did
13 incrementals during the week, as I recall. And we would
14 take the full backup, which probably happened on a Thursday
15 night so somebody could take it home on the weekend on a
16 Friday.

17 Q. And all of the source code was put into this CVS
18 repository; is that correct?

19 A. All source code that the programmers worked on went
20 into CVS, yes.

21 Q. And you described that as some sort of revision
22 control? Is that what you said?

23 A. It's a version control system, pretty common today.
24 CVS is still used. There are competitors to CVS. It's an
25 open source code version control system.

Mason - direct

1 Q. And XpertUniverse used CVS the entire time that you
2 were there to store the source code; right?

3 A. From the time we started any kind of computer
4 programming development, we used CVS, yes.

5 Q. Okay. The other one you mentioned was QuickPlace;
6 right? What was that?

7 A. QuickPlace was a documentary repository, similar to a
8 document repository in cloud you might use today. It was an
9 IBM product that allowed us to upload documents from
10 anywhere, whether we were at home or whether we were at the
11 office.

12 All documents, any business documents went to
13 QuickPlace, and we shared our documents using QuickPlace.
14 It automatically sent out an e-mail to anyone on the
15 receiving list.

16 Q. So if you uploaded something to QuickPlace and you had
17 set this up previously, you would get an e-mail ping back
18 saying it was received by QuickPlace?

19 A. That is correct.

20 Q. Okay. And how were the individual computers backed
21 up?

22 A. Well, if we look at the chart, all the corporate
23 management had their, what we'll call their document
24 directories, and as I've now, having looked at some of the
25 backup tapes, we actually had what you would like to call

Mason - direct

1 the desktops, what you see on the computer screen. We
2 actually pulled them off of their computer systems and
3 actually backed them up onto tape.

4 We also, if they were also connected to the
5 network drive, we also backed up the network drive. And I
6 saw those on the backup tapes.

7 From the -- some of the developers and the
8 architects, a lot of the programmers, we did not actually
9 pull the data off of think desktop computers. What we did
10 is by understanding, they either uploaded their information
11 to CVS or any business documents that were completed would
12 have been put into QuickPlace. But the off-serve system
13 itself didn't dynamically go into a developer or a
14 programmer desktop.

15 Q. And how do you know that all these developers and
16 architects were saving their documents to this QuickPlace
17 directory?

18 A. Well, it was policy in the company that all documents
19 went into QuickPlace, all source code went into CVS. That
20 would have been their job. By policy, everyone used
21 QuickPlace.

22 Q. Okay. And were there any computers that were not
23 connected to the network?

24 A. Not to my knowledge, no.

25 Q. And so just so we're clear, if someone had saved a

Mason - direct

1 document locally on their computer, would this have been
2 backed up?

3 A. In the -- it's possible to create a directory in a
4 computer that wouldn't have been backed up. It's my
5 understanding, if that was done it was that somebody was
6 doing a document of their kid's party. I am very active in
7 the Boy Scouts, would have written a document for my Boy
8 Scout troop. It is unlikely, well, one I would have put it
9 into QuickPlace; and, two, it's unlikely that it would have
10 been backed up.

11 Q. But it's all -- it's your testimony -- I'm sorry. Go
12 ahead.

13 A. But I'd like to state that any business document,
14 nonpersonal, it's my understanding that everyone put
15 something into either QuickPlace or the network drive for
16 back up or it went to CVS.

17 Q. And -- go ahead. Sorry.

18 A. On the chart, you'll see the FTP site. That's for
19 file transfer protocol. That's actually more like a
20 drop box connection. It was used really for transferring
21 large files that couldn't go through e-mail back and forth,
22 but anything that went in there would have had to have been
23 backed up, would have been in either the CVS and/or
24 QuickPlace.

25 Q. And how do you know that some other architect or

Mason - direct

1 developer actually was saving their documents to
2 QuickPlace?

3 A. We would have, an e-mail would have been generated and
4 sent out to the appropriate architect who was responsible
5 for that.

6 Q. And who are the architects at XpertUniverse, the
7 primary architects when you were there?

8 A. The primary architects besides myself, Jim Nevin,
9 James Nevin, John Steinhoff, Theo Faro, a woman named Karen
10 Bartlett, I believe, and Abe Zelkin was our vice president
11 of technology.

12 Q. Okay. And just go to the next slide, please.

13 Is this another slide you created, sir?

14 A. Yes, I did.

15 Q. Okay. And it's a little hard to read on the screen,
16 but essentially you -- at the time you started in roughly
17 August 1999 to the time you left in some time mid-2000,
18 XpertUniverse was employing this backup procedure, as you've
19 described today; is that correct?

20 A. That is correct.

21 Q. And so any of the data that was on the desktops or in
22 these various repositories would have been captured in those
23 backup tapes as of the time you left --

24 A. Yes.

25 Q. -- in mid-2007?

Mason - direct

1 A. Yes.

2 Q. All right. And then the company essentially shut down
3 at that point?

4 A. XU materially stopped all work as far as I know when I
5 was there. Theo Faro had completed her work towards the end
6 of 2006, and I knew of no more business work that was done
7 after that point in time, sometime in the beginning to
8 mid-2007.

9 Q. And essentially, then, those desktops, as far as you
10 understand, would have been just unplugged?

11 A. Either unplugged or sitting there, not being used.

12 Q. Okay. And then I believe Mr. Friedman testified that
13 he moved his office some time in roughly December 2010?

14 A. He did. He told me that, yes. I was not involved in
15 that.

16 Q. And based on your knowledge of what was going on at
17 XpertUniverse during the relevant time and being in charge
18 of the backup procedures, you know, do you think any of the
19 relevant business data would have been lost or not captured
20 on those backup tapes?

21 A. I can't see how we would have missed it. I personally
22 had a procedure in place every three to four, we would
23 actually take sample backup tapes and we would restore data,
24 having seen backup tapes go bad, to verify that they were
25 operational.

Mason - direct

1 Given the backup procedures, I think everything
2 from a business standpoint would have been backed up on
3 those tapes.

4 MR. CANTINE: Thank you very much.

5 THE COURT: Mr. Schuman?

6 MR. SCHUMAN: Thank you, your Honor.

7 CROSS-EXAMINATION

8 BY MR. SCHUMAN:

9 Q. Good morning, Mr. Mason.

10 A. Good morning.

11 Q. My name is Brett Schuman and I represent Cisco.

12 Mr. Mason, you have a -- currently, you're
13 on a consulting agreement with XpertUniverse; is that
14 correct?

15 A. Yes.

16 Q. You're being paid for your time here today; is that
17 correct?

18 A. I am, yes.

19 Q. And I think you said in response to Mr. Cantine's
20 questions, you were employed by XpertUniverse from
21 approximately late 1999, early 2000, until the end of 2006;
22 is that correct?

23 A. That's correct.

24 Q. Your title is director of technology; right?

25 A. Yes.

Mason - cross

1 Q. And when you were employed by XpertUniverse, used both
2 a desktop computer and a laptop computer; correct?

3 A. That is correct.

4 Q. And when you left XpertUniverse, you took the laptop
5 computer with you, didn't you?

6 A. I did.

7 Q. And I think you testified at your deposition, you
8 repurposed that laptop for your daughter's use; right?

9 A. I did.

10 Q. And as part of repurposing that laptop, you
11 reformatted the hard drive; right?

12 A. I would have, yes.

13 Q. Did you take any steps to preserve any XU data on that
14 laptop before you repurposed it for your daughter?

15 A. Any data that would have been XU-oriented would
16 have been in QuickPlace and I would have uploaded anything
17 there.

18 Q. But when you repurposed the laptop for your daughter,
19 did you do anything specific with respect to any XU data
20 that would have been on the laptop's hard drive at that
21 time?

22 A. Well, any documents that would have been there, I did
23 do regular backups in my own laptop and I did provide some
24 documents that I had there to -- to Stroock.

25 Q. What happened to your desktop computer, Mr. Mason?

Mason - cross

1 A. That was left on my desk at XpertUniverse.

2 Q. You are the administrator for -- strike that.

3 Mr. Cantine asked you some questions regarding
4 something called QuickPlace.

5 Do you remember that?

6 A. Yes.

7 Q. And you were the administrator at XpertUniverse for
8 the QuickPlace depository; right?

9 A. That's correct.

10 Q. And I think you said QuickPlace is where every
11 business document went; is that right?

12 A. Yes.

13 Q. And that would include technical documents regarding
14 XU's technology, such as design documents, those kinds of
15 documents would go to QuickPlace; right?

16 A. That's correct.

17 Q. And functional specifications are also documents that
18 would have been stored in QuickPlace; is that correct?

19 A. Yes.

20 Q. Documents regarding the development of the inventions
21 in XU's patents would have been stored in QuickPlace;
22 right?

23 A. Yes.

24 Q. And also documents regarding XU's work on the project
25 with Cisco, those documents would have been stored in

Mason - cross

1 QuickPlace; right?

2 A. Yes.

3 Q. QuickPlace is no longer accessible, is it?

4 A. QuickPlace is not accessible now, no.

5 Q. But when it was running, whether it was accessible,
6 Mr. Mason, you testified that QuickPlace was being backed up
7 regularly; is that right?

8 A. Yes.

9 Q. And in the course of your work with XU for purposes of
10 this litigation, you've reviewed some of those backup tapes;
11 right?

12 A. Correct.

13 Q. And in connection with your review of those backup
14 tapes, you didn't find any of the backups for QuickPlace,
15 did you?

16 A. That's not correct. I did find QuickPlace backup
17 tapes. They are encrypted. There are hundreds of megabytes
18 of backup data that QuickPlace -- the QuickPlace of the year
19 2000/2001, is quite different than the -- IBM has
20 discontinued the use of QuickPlace, so creating a QuickPlace
21 environment to restore the tapes is extremely difficult.
22 We worked with IBM and we're having difficulty doing that.

23 Q. Do you recall when you were deposed in this case being
24 asked questions regarding whether any backup tapes were
25 found for QuickPlace?

Mason - cross

1 A. I do recall that, yes.

2 Q. And at page 149 of your deposition transcript, lines
3 10 to 11:

4 "Question: Why not?

5 "Answer: We haven't found any backups for
6 QuickPlace."

7 So is it your testimony today, Mr. Mason, that
8 since your deposition, some backup tapes for the QuickPlace
9 directly have been found?

10 A. That is correct.

11 Q. And is it also your testimony, Mr. Mason, that those
12 backup tapes are encrypted?

13 A. They're -- they appear to be indecipherable with data,
14 so I would have to say using my best judgment, they are
15 encrypted.

16 Q. So then isn't it a true statement, Mr. Mason, that as
17 part of this litigation, there has been no data pulled from
18 the backup tapes for QuickPlace for purposes of this case;
19 isn't that correct?

20 A. Well, I provided that information to Stroock, but I
21 have not actually seen data, something in readable format.

22 Q. As part of your work on the backup tapes in this case,
23 isn't it a true statement that no data has been pulled from
24 the backup tapes for the QuickPlace directly?

25 A. Well, to be clear, data the was pulled, but it was in

Mason - cross

1 encrypted format.

2 Q. And I think your testimony was it's indecipherable; is
3 that correct?

4 A. As far as I could see, yes.

5 Q. Your testimony was that the backup tapes created by
6 XpertUniverse included certain folders on certain users'
7 desktop computers; right?

8 A. Yes.

9 Q. Do you recall preparing a declaration in connection
10 with this motion that we're here on today, Cisco's motion
11 for terminating sanctions, Mr. Mason?

12 A. I remember a declaration. I have that in front of me.

13 MR. SCHUMAN: Your Honor, I have copies of
14 Mr. Mason's declaration. May I approach?

15 THE COURT: Yes, you may.

16 (Mr. Schuman handed documents to the Court and
17 to the witness.)

18 BY MR. SCHUMAN:

19 Q. Do you recognize your declaration, Mr. Mason?

20 A. Yes.

21 Q. You wrote the declaration; right?

22 A. I did.

23 Q. In paragraph 12 of your declaration, Mr. Mason, you
24 talk about Mr. Rutberg's desktop folder.

25 Do you see that?

Mason - cross

1 A. Yes.

2 Q. And you say, by way of example, Mr. Rutberg's desktop
3 folder and various related folders were captured by the
4 backup process described above and found on the backup
5 tapes.

6 A. That's correct.

7 Q. Which -- which local folders from Mr. Rutberg's
8 desktop computer were you referring to that were found in
9 the backup tapes?

10 A. I was referring to the actual desktop that you would
11 see on your computer screen, when you were back at the icon
12 level on a computer. They were actually pulled, and I also
13 noticed a document directory.

14 Q. And is that all of the local directories that would
15 have been on Mr. Rutberg's computer, Mr. Mason?

16 A. There may have been others, but they would all be
17 under the basic document directory structure. I don't
18 recall exactly which directories were there.

19 Q. Mr. Cantine put a graphic up on the screen and you
20 had -- that you had created where there was a line, and on
21 the left-hand side you had management and on the right-hand
22 side you had developers?

23 A. Correct.

24 Q. Which side was Mr. Rutberg on?

25 A. He would have been on the left side, the corporate

Mason - cross

1 **manager.**

2 **Q. And you found those directories that you just**
3 **testified to on the backup tapes for Mr. Rutberg's desktop**
4 **computer; right?**

5 **A. Yes, I did.**

6 **Q. In connection with your work in this case, did you**
7 **find any such directories for Mr. Steinhoff on any of the**
8 **backup tapes?**

9 **A. Mr. Steinhoff? No. That would have been -- no.**

10 **Q. And that's because Mr. Steinhoff was on the right-hand**
11 **side of that dotted line on your graphic; is that correct?**

12 **A. That is right. That's correct.**

13 **Q. And your testimony earlier for Mr. Cantine was, if you**
14 **were on the right-hand side of that line, the Arc Serve**
15 **software did not automatically back up the local drives on**
16 **those computers; is that right?**

17 **A. That is correct.**

18 **Q. And Mr. Steinhoff -- therefore, Mr. Steinhoff's**
19 **computer was not being backed up, the local directories were**
20 **not being backed up; is that correct?**

21 **A. That's correct.**

22 **Q. Mr. Steinhoff is one of the named inventors on both of**
23 **the XU patents in this case, isn't he?**

24 **A. Yes, he is.**

25 **Q. Mr. Mason, as part of your review of the backup tapes**

Mason - cross

1 in this case, did you find any of the local directories for
2 your desktop computer on those tapes?

3 A. No.

4 Q. And that's because you were on the right-hand side of
5 this dotted line as well; is that right?

6 A. That is correct.

7 Q. And you, sir, are a named inventor on both of XU's
8 patents in this case, aren't you?

9 A. Yes, I am.

10 Q. How about Mr. Nevin? In your review of the backup
11 tapes, did you find any of the local drive directories for
12 Mr. Mason on these backup tapes? I'm sorry. Strike that.
13 I misspoke.

14 Mr. Nevin. In your review of the backup tapes,
15 did you find any of the local directories for Mr. Nevin's
16 computer on the tapes?

17 A. No.

18 Q. That's because Mr. Nevin is on the right-hand side of
19 this dotted line in your graphic; is that correct?

20 A. That's correct.

21 Q. Mr. Nevin is a named inventor on both of the XU
22 patents in this case; right?

23 A. Yes, he is.

24 Q. How about Mr. Zelkin? Did you find any local backups
25 for his computer on these backup tapes?

Mason - cross

1 A. Yes.

2 Q. Which ones?

3 A. His desktop directory and other document folders.

4 Q. Which side of the line, your dotted line, was
5 Mr. Zelkin on?

6 A. I put Mr. Zelkin on the left side, the corporate
7 management.

8 Q. His title was CTO; right?

9 A. Yes, or Vice President of Technology. I'm not sure.

10 Q. Which side of the line was Mr. Alex Merker on, going
11 back to your graphic?

12 A. Alex Merker would have been on the left side,
13 corporate management.

14 Q. Did you find any back ups on the backup tapes of
15 Mr. Merker's local directories?

16 A. Yes.

17 Q. Which ones?

18 A. His document directories. I can't speak specifically
19 which ones. I would have to have a directory structure in
20 front of me, but most of his computer was backed up. The
21 documents were backed up.

22 Q. How about Ms. Faro? In your review of the backup
23 tapes, did you find any backups for her local directories?

24 A. Yes, I did.

25 Q. And which directories?

Mason - cross

1 A. They were also her document directories from a
2 desktop.

3 Q. Mr. Mason, you personally stored documents regarding
4 the XU '903 patent, one of the two patents-in-suit. You
5 personally stored documents regarding the development of the
6 invention and that patent both on your desktop as well as on
7 QuickPlace; right?

8 A. That would be correct.

9 Q. And you also personally stored documents regarding the
10 development of the invention of the '709 patent, the other
11 patent in this case, on both your local -- your desktop
12 computer as well as on QuickPlace; right?

13 A. Yes.

14 MR. SCHUMAN: I don't have any other questions.
15 Thank you, Mr. Mason.

16 REDIRECT EXAMINATION

17 BY MR. CANTINE:

18 Q. Mr. Mason, Mr. Schuman was just asking you some
19 questions about whether Mr. Steinhoff, whether you found his
20 local directory on backup tapes; right?

21 A. Yes.

22 Q. Was it Mr. Steinhoff's practice to save all business
23 records into the QuickPlace repository?

24 A. Absolutely.

25 Q. Was it your practice to save all business records into

Mason - redirect

1 the QuickPlace repository?

2 A. Absolutely.

3 Q. Was it Mr. Nevin's practice to save all business
4 documents to the QuickPlace repository?

5 A. Yes, absolutely.

6 Q. Mr. Schuman just asked you some questions about
7 whether you personally stored documents related to the two
8 patents on both your desktop and the -- and QuickPlace;
9 right?

10 A. Yes.

11 Q. Were any of the documents you stored on your desktop,
12 if they were important business documents, would have ended
13 up on QuickPlace?

14 A. Every one would have been put into QuickPlace.

15 Q. Would that be the same for Mr. Steinhoff, Mr. Zelkin,
16 and the others?

17 A. I absolutely believe that, yes.

18 MR. CANTINE: No further questions. Thank you,
19 your Honor.

20 THE COURT: Are the questions about laptops
21 germane to anything here?

22 MR. CANTINE: That is not an issue that has been
23 raised before, your Honor.

24 THE COURT: Okay. I didn't think it had been.
25 Is it germane to anything?

Mason - redirect

1 MR. SCHUMAN: I think the focus is on the
2 desktops, your Honor, and Mr. Mason obviously is one of the
3 few XU employees who had both a laptop and a desktop, and so
4 I asked a few questions about the laptop.

5 THE COURT: The only reach I'm asking is, it
6 seemed to me that the laptop questions were going somewhere,
7 but they didn't get to wherever it was they were going,
8 so I'm just wondering, before Mr. Mason goes away, but
9 what I'm hearing is, they weren't really intended to go
10 anywhere.

11 MR. SCHUMAN: Let me clarify, your Honor.

12 Our focus is on the desktops, and I think we
13 established a few things here, which I'm happy to summarize
14 when we're done.

15 THE COURT: All right. Well, I'm just trying to
16 figure out --

17 MR. SCHUMAN: With the laptops, though --

18 THE COURT: Yes?

19 MR. SCHUMAN: -- a few XU employees had laptops.
20 My understanding it was not company policy. Mr. Mason is
21 one of those employees, and Mr. Mason had a laptop that he
22 used for XU business work, and when he repurposed it for his
23 daughter, my understanding -- and you just heard Mr. Mason's
24 testimony -- is that there was no effort to recover XU data
25 on there before the hard drive was cleaned.

Mason - redirect

1 I interpreted Mr. Mason's testimony, but we all
2 heard it to be that there was no need to do that because
3 anything on that computer would have been backed up to this
4 QuickPlace.

5 THE COURT: All right. And Mr. Mason, I guess
6 that's the only point I was interested in, is whatever you
7 had on your laptop that was business related, was there some
8 procedure that you followed or that was company policy or
9 resulted in the business information data, however you want
10 to call it, being preserved on essentially on the backup
11 tapes?

12 THE WITNESS: Yes. Anything I had done on the
13 laptop would have been up uploaded to QuickPlace. Could
14 have done it from home or in the office. And I would have
15 either gone to QuickPlace or CVS and then would have been
16 backed up on the backup tapes.

17 THE COURT: So basically it was company policy
18 that whoever had laptops, they were supposed to be doing --
19 well, let me just step back.

20 My understanding is essentially if you are on
21 the management side of the dotted line, things get put onto
22 QuickPlace and other -- essentially, a computer is drawing
23 these things and saving them.

24 If you were on the right-hand side, the
25 architect side, it's more a question of, did you follow

Mason - redirect

1 company policy and upload these things.

2 All right. I think I understood what you said.

3 All right. Thanks, Mr. Schuman.

4 All right. Well, and just so I have it on the
5 top of my head now -- actually, let me just ask.

6 So in terms of business information documents,
7 source code, is there anything that was done using the
8 computer in XpertUniverse's business that would not have
9 made its way eventually into the backup tapes?

10 THE WITNESS: I don't believe that's -- that it
11 would have been possible procedurally. Everyone uploaded to
12 the, one of the document repositories.

13 THE COURT: So maybe a different way of saying
14 it is, if people followed what you understood to be the
15 company's policies, everything business concern would have
16 been preserved on the backup tapes?

17 THE WITNESS: Yes, I would agree with that.

18 THE COURT: And so then the only question is, or
19 a question, but as it turns out, some of what was saved on
20 the backup tapes seemed not to be retrievable into a humanly
21 understandable form today?

22 THE WITNESS: Yes.

23 THE COURT: All right. All right. Unless there
24 are any questions from either of you, Mr. Mason, thank you
25 very much.

1 THE WITNESS: Thank you.

2 (Witness excused.)

3 THE COURT: All right. Mr. Schuman, do you want
4 to take a minute and tell me what you think is important
5 about what Mr. Mason just said.

6 MR. SCHUMAN: Yes, your Honor. I think we just
7 figured out the, perceived on our part inconsistency between
8 what Mr. Mason said in his deposition and when he said in
9 his declaration in opposition to this motion for a whole
10 slew of XpertUniverse employees, including all of the
11 inventors on the patents-in-suit. Their desktop computers
12 were not being backed up, including Mr. Mason, including
13 Mr. Steinhoff, including Mr. Nevin. The only one who is a
14 named inventor on these patents is the CTO, Mr. Zelkin, who,
15 as I understand it from Mr. Mason, he puts him on the
16 left-hand side of the line.

17 The reason why QuickPlace is significant, your
18 Honor, and I think the fundamental disconnect between the
19 two sides on this point, XpertUniverse believes the fact
20 that everything was being backed up to QuickPlace makes it
21 irrelevant that these desktop computers were destroyed
22 without imaging them. The problem, your Honor, is that we
23 have doggedly pursued discovery from the QuickPlace
24 directory since we learned of it in the very first
25 deposition in this case, and what we have been consistently

1 told is what you heard Mr. Mason say today. They're not
2 able to recover any of the data that was stored to
3 QuickPlace, so the fact that XpertUniverse had a policy of
4 regularly storing data, business data, technical data,
5 functional specifications, documents regarding the
6 development of the patents in this case, documents regarding
7 XU's purported trade secrets -- the fact that all of those
8 documents were stored on QuickPlace as well as on local
9 desktops, QuickPlace is irrelevant, your Honor. It's done.
10 We didn't get any discovery from QuickPlace and Mr. Mason
11 has confirmed that on the stand.

12 When XpertUniverse destroyed those desktop
13 computers well after this litigation was filed, QuickPlace
14 was inaccessible. The only other location for the data from
15 the inventors on the patents in this suit was on their
16 desktops.

17 Mr. Friedman -- can we put up the first slide?
18 We have just a few slides in summary.

19 Mr. Friedman testified at his deposition -- this
20 was the very first deposition in the case:

21 When did you move offices?

22 December of 2010.

23 So in December of 2010, XpertUniverse got rid of
24 old laptops and desktops that it had?

25 Not laptops, a few desktops.

1 A few desktops?

2 Yes.

3 Approximately how many? I would say five, six,
4 to the best of my recollection.

5 Do you recall which employees used those?

6 John Steinhoff, David Rutberg, maybe Alex
7 Merken.

8 I think Mr. Friedman didn't remember all of the
9 names, but I think from the testimony, Mr. Mason, of course,
10 used the desktop. Mr. Mason is on the right-hand side of
11 that line. His desktop is gone. Mr. Friedman couldn't
12 remember his name, and I am going to make the argument, make
13 the assertion that based on all the evidence, Mr. Mason's
14 desktop was another one of the desktops that was discarded
15 after the filing of this case.

16 Mr. Mason testified today he said in his
17 deposition, he had notes, memoranda, functional specs,
18 design specs, other documents regarding the development of
19 XU's technology, including the patents, on his desktop and
20 on QuickPlace.

21 QuickPlace is gone. His desktop was destroyed
22 after the case was filed. Along with Mr. Steinhoff, who is
23 a named inventor and on XU's witness list, his desktop,
24 Mr. Friedman acknowledges, was destroyed. And we now know
25 from Mr. Mason's testimony, his desktop was not being backed

1 up, your Honor, and so anything that he stored in QuickPlace
2 is accessible and has not been produced in this litigation,
3 and his desktop is gone.

4 THE COURT: I'm sorry. When you say his desktop
5 was not being backed up, what when you mean is it's not
6 being backed up on that. Correct?

7 MR. SCHUMAN: Correct. There is a backup
8 procedure and what was being stored on these backup tapes
9 was this Arc Service software that they had that Mr. Mason
10 testified to would go onto the network computers, they're
11 all on a network, and would, for lack of a better work, suck
12 the data off of the document directories, but only for those
13 employees on the left-hand side of Mr. Mason's line. Those
14 are the business types. That's Victor Friedman, that's Ms.
15 Eiss.

16 THE COURT: Right, right.

17 MR. SCHUMAN: This is a patent case, among other
18 things, and none of the technology folks, none of the
19 developers, none of the architects, none of the named
20 inventors other than Mr. Zelkin, none of their computers
21 were being backed up. And I think the evidence establishes
22 that data was lost because QuickPlace, where they were
23 supposed to, as a matter of company policy, store this stuff
24 as well, is inaccessible to a human, as your Honor put it.
25 There's no discovery from QuickPlace in this case. That's

1 the simplest way to put it.

2 And after this case was filed, a year-and-a-half
3 after this indication was filed, they should not have
4 destroyed the only accessible source of that data, the hard
5 drives of the inventors, Mason, Nevin, Steinhoff.

6 I have a few other slides which are more on the
7 overall motion, your Honor, but you asked me just to
8 summarize what I think we established with Mr. Mason, and I
9 think it's significant.

10 THE COURT: Well, actually, if I can just ask
11 Mr. Mason another question.

12 Mr. Mason, you're still under oath. Okay?

13 MR. MASON: Yes.

14 THE COURT: You don't have to -- when did you
15 first learn that the materials that you were looking for on
16 QuickPlace were indecipherable?

17 MR. MASON: A couple months ago, a few months
18 ago, when I got the QuickPlace tapes.

19 THE COURT: Were you involved before then in
20 trying to find what was on these backup tapes?

21 MR. MASON: Yes.

22 THE COURT: How long have you been involved in
23 trying to find what is on the backup tapes?

24 MR. MASON: Probably close to a year.

25 THE COURT: All right. But before that,

1 whoever was looking at the backup tapes was somebody other
2 than you?

3 MR. MASON: Yes, I think Stroock had a company
4 going through backup tapes.

5 THE COURT: Okay. All right. Well, I'm just
6 interested in what you know. So -- all right. Thank you.

7 I'm sorry. Go ahead, Mr. Schuman.

8 MR. SCHUMAN: Your Honor, I have two more slides
9 to summarize the entirety of the terminating sanctions
10 motion, but if you just want to hear about Mr. Mason, I can
11 hold those.

12 THE COURT: Well, why don't you finish up and
13 then Mr. Cantine can address everything at once.

14 MR. SCHUMAN: These are a few of the places in
15 the record and also from Mr. Mason's deposition just
16 establishing the kinds of materials that were stored on
17 these desktop computers that were destroyed after the filing
18 of the case.

19 Daily documents, that's from Mr. Rutberg, and
20 that's in the record at DI 295, draft documents were saved
21 to the desktops. Architectural documents, all support,
22 development, business, presentation documents, et cetera,
23 were saved on David's machine. That's David Rutberg.

24 Visio, which are drawings, these are the
25 drawings of algorithms and flow charts and things, Visio and

1 Microsoft Word automatically created a file locally on the
2 screen first, which were then put into QuickPlace.

3 My understanding is the way the QuickPlace
4 program works, it creates a little agent on your desktop.
5 It stores it first there and then it transfers it up to
6 QuickPlace, and that's how things are stored on QuickPlace.

7 Again, with QuickPlace inaccessible and the
8 desktops destroyed, we've lost the only two places where
9 documents and drawings regarding the development of the
10 inventions in this case would have been accessible.

11 Notes from meetings discussing the invention
12 claimed in the '903 patent.

13 Visio documents, he also said notes regarding
14 the invention claimed in the '709 patent. Those are right
15 out of Mr. Mason's deposition. He forthrightly acknowledged
16 it on the stand today, so his deposition is largely
17 superseded.

18 There are -- I think Mr. Mason's declaration is
19 truthful to a point, and I think sometimes the phrase a half
20 truth is a whole lie is appropriate here because it is a
21 true statement that Mr. Rutberg, who was on the left-hand
22 side of that line, had his desktop being backed up.

23 And there have been some documents in discovery
24 from Mr. Rutberg's desktop. But what was not stated in
25 Mr. Mason's declaration, and what I think we learned here

1 today, that there's a whole group of other employees whose
2 desktops were not being backed up, were not found on those
3 tapes, and that's why we don't have that evidence. And
4 those are the very computers who we know, or I think we can
5 figure out whose computers were destroyed.

6 Steinhoff --

7 THE COURT: I mean, his testimony was not that
8 they were not being backed up. It was that they were being
9 backed up.

10 MR. SCHUMAN: His testimony was that the
11 automatic software that backed up the local documents'
12 directories, the subject of his declaration, paragraphs 9
13 through 12, Arc Serve software by Computer Associates, these
14 would backup the local drives. That's what he says in
15 paragraph 11.

16 And in paragraph 12, he says, by way of example,
17 Mr. Rutberg's desktop folder was being backed up.

18 This is all about this Arc Serve software that
19 backed up the local document directories, my documents,
20 desktop. That software, what was not stated in this
21 declaration, but what Mr. Mason just said on the stand, that
22 software was not applied to any of the developers on the
23 right-hand side of that dotted line. The testimony is that
24 those folks, as a matter of company policy, were also
25 expected to store those documents in QuickPlace, and that

1 Mr. Mason himself complied with that policy. But, your
2 Honor, QuickPlace is gone.

3 THE COURT: No, no, no, no. But I mean, in
4 other words, there's maybe -- probably depending on how you
5 look at it, multiple issues here, but one of them is, is I
6 think, more or less, did XU's business documents get stored
7 on backup tapes.

8 And what I'm hearing is, some of them may have
9 been done automatically, but even to the extent it's not
10 done automatically, that's a matter of company policy it
11 gets done. That's what I think Mr. Mason said today.

12 MR. SCHUMAN: As a matter of company policy, he
13 said that they were all supposed to store things to
14 QuickPlace, and that Mr. Mason did that and he understands
15 Mr. Steinhoff did that. I think that was the point of
16 Mr. Cantine's followup examination.

17 THE COURT: Right.

18 MR. SCHUMAN: But that directory --

19 THE COURT: But then the second issue is, okay.
20 So that's a good procedure, results in preservation of the
21 company's records, and then there's a second issue, which
22 is, depending on whether it perhaps is, oops, what's on the
23 backup tapes, you know, is it there if you can't understand
24 what it says? I mean, apparently, it's there, but either
25 because -- I don't know -- code has changed in six or

1 eight years, or IBM sold its computer business, or for some
2 reason or another, no one now can retrieve it.

3 MR. SCHUMAN: I would state that, I agree with
4 your Honor, that there are two issues. First, what was
5 being backed up and, second, what is accessible for purposes
6 of this litigation for backup.

7 THE COURT: Right.

8 MR. SCHUMAN: Those are the two issues. I agree
9 with you.

10 On the first issue, what we were told in
11 response to our motion is that, generally, everything was
12 being automatically backed up through this Arc Serve
13 program, and what we've figured out is that is not the case
14 for the employees that I would submit matter most in a
15 patent case, in a trade secret case, which is that the
16 architects, they were not being backed up. As a matter of
17 company policy, we are told the evidence is from Mr. Mason
18 that they were backing, they were encouraged to store things
19 on QuickPlace.

20 With respect to -- and then the second issue I
21 think, as your Honor said it, and what can we get from those
22 backups? And I would submit, your Honor, that's where the
23 real prejudice is here.

24 Those backup tapes -- and Mr. Mason, what he
25 said today is consistent with his deposition testimony, that

1 in about December of 2011, he was asked to look at these
2 backup tapes by Mr. Friedman.

3 That's too late, your Honor. This case was
4 filed in March of 2009 and that process should have happened
5 then and XpertUniverse should have known then what was on
6 these backup tapes. And certainly when Mr. Friedman wanted
7 to destroy five, six, the testimony is actually up to ten,
8 but what we have in his deposition is five to six, including
9 Mr. Steinhoff and including most likely Mr. Mason's
10 computers, a year-and-a-half after the case was filed,
11 December 2010, they should not have done that.

12 All of this should have happened when the case
13 was filed, your Honor. We should have known whether
14 QuickPlace was accessible to get that data. That data is
15 gone. In discovery, we did not get any memos, we did not
16 get any notes regarding the development of these inventions
17 or claimed trade secrets. They're not there. And that's
18 because QuickPlace is inaccessible and has been, and they
19 should have figured that out sooner and they should have
20 figured it out before they knowingly destroyed the desktop
21 computers of the named inventors in this case.

22 THE COURT: All right. Thank you.

23 MR. SCHUMAN: Thank you, your Honor.

24 MR. CANTINE: I think to suggest Mr. Mason or
25 anyone else has been less than fully truthful is stepping

1 over the line. He got up there and told us exactly what
2 happened.

3 THE COURT: I credit -- you know, I'm not sure
4 that it will make any difference one way or the other, but I
5 accept what Mr. Mason said today as being truthful.

6 MR. CANTINE: Thank you.

7 And, your Honor, there are the two questions,
8 like you said. Were the business records being backed up?

9 THE COURT: Actually, I'm sorry, Mr. Cantine. I
10 just have a few questions.

11 Do we know, Mr. Schuman pointed to an excerpt
12 from maybe Mr. Friedman's deposition as saying here are the
13 two computers that were destroyed. Do we actually know
14 whose desktops were destroyed?

15 MR. CANTINE: He was less than clear about it.
16 I mean, he couldn't remember the number.

17 THE COURT: Right. I got that.

18 MR. CANTINE: And he certainly wasn't, I
19 don't think, sure which ones. I don't know if they were
20 labeled.

21 Mr. Mason could maybe tell us whether it had
22 Steinhoff, Mason, whatever on the computer itself, but I
23 don't know how he would have known that they all looked the
24 same, which one was which. But he threw out a couple names.
25 One was Mr. Rutberg and one was perhaps Mr. Steinhoff, but

1 it's certainly less than clear as to whether or not he was
2 simply guessing at that point.

3 THE COURT: Well, let me ask because sometimes
4 you can figure these things out circumstantially.

5 Were there a bunch of other desktops that were
6 not destroyed or were these the last remaining desktops?

7 MR. CANTINE: I believe those were the last
8 remaining because, again, remember he was moving offices, so
9 he just got rid of all the nonworking ones that had been
10 collecting dust for many years.

11 THE COURT: And do we know? How many desktops
12 did XU have at its peak?

13 MR. CANTINE: I don't know that information
14 right now, your Honor.

15 THE COURT: I mean, I guess what I'm -- you
16 know, I hear about CTOs and COOs and CEOs and inventors, but
17 I don't actually really have much of an idea that there were
18 ten people and everybody was a chief, or there were 400
19 people and this was the high level skill.

20 MR. CANTINE: Mr. Mason could probably tell
21 you, but my recollection is at its height, XpertUniverse had
22 somewhere, about maybe 20 employees. There's the core group
23 of the architects and developers. We kind of had the
24 corporate management side with probably four or five people
25 and you had a lot of other developers and worker bees, if

1 you will, that kind of came and went along over the years.

2 THE COURT: Well, so I'm guess, maybe the point
3 is this happened back in 2007 or 2008, so therefore it
4 does not seem to indicate the same things, but I guess if we
5 had those desktops today, at some point, they are all
6 destroyed.

7 MR. CANTINE: Right.

8 THE COURT: The issue here is some survived the
9 onset of litigation and so therefore there's a different
10 issue that's implicated.

11 MR. CANTINE: Correct. If he had thrown out all
12 the desktops and all the laptops the day the company shut
13 down in 2007, there's no issue there because he didn't have
14 any expectation of suit at that point. But, yes, a handful
15 survived that date, that critical date, if you will, and
16 then were discarded.

17 But I think the testimony we heard today was
18 unequivocal. All business records were backed up. And the
19 issue we're facing is essentially, you know, did
20 Mr. Friedman have reason to believe that all the data that
21 was on those desktops was backed up at the time he threw
22 them out, and it was unequivocally the company policy to
23 back everything up to the tapes.

24 You know, would I recommend he throw the
25 desktops out? No. But --

1 THE COURT: I'm pretty sure you didn't.

2 MR. CANTINE: Yes. But that's what we're left
3 with. And the question is, was the information, number
4 one, right, as you said? Did the business records get
5 backed up? The testimony is they did. All -- it's the
6 company policy he was there from day one, Mr. Mason was
7 there from day one.

8 The architects collectively, they had to work
9 together. They were all working on the same solution.
10 They needed all those documents to be in the same place and
11 they could all get access to them, and that same was
12 QuickPlace.

13 The second issue, whether we can now get the
14 data off those tapes is a completely different issue, you
15 know. That didn't come up until Mr. Friedman's deposition,
16 where I would remind the Court, he volunteered the fact that
17 he threw these things out. You know, that just came out of
18 left field. I mean, he literally volunteered it.

19 So that's what the whole issue --

20 THE COURT: I'm sorry, Mr. Cantine. When was
21 this deposition, roughly speaking?

22 MR. CANTINE: I believe it was in December.

23 MR. SCHUMAN: December of 2011, your Honor.

24 MR. CANTINE: 2011.

25 THE COURT: All right. So that's kind of

1 consistent with Mr. Mason about a year ago being asked to
2 start looking at these backup tapes?

3 MR. CANTINE: Right.

4 THE COURT: All of a sudden now, there's an
5 issue.

6 MR. CANTINE: There's an issue, so we say, okay.
7 Let's go find the backup tapes and see if we can get the
8 data off of them and we tried. Believe me, Mr. Mason spent
9 a lot of time calling up his old colleagues from IBM to try
10 to get this QuickPlace up and running and just never was
11 able to do it. But to suggest we should have on day one
12 gone to these backup tapes and figured out whether the data
13 was accessible is a stretch, at best.

14 And I hear Mr. Schuman now arguing that the real
15 prejudice is that we can't get the data off the backup
16 tapes. But that's not why we're here. That's not what
17 their motion was about. Their motion was about some
18 destruction of evidence, and I mean we've spent more time on
19 this issue than we did on summary judgment. And I think
20 we've had -- obviously, it needs to come to an end. Right?
21 We didn't have any obligation to look at those backup tapes
22 before this whole issue was raised in December of 2011.

23 I can go on with what we've learned. I want
24 to explain to you the declarations we filed yesterday, and
25 maybe --

1 THE COURT: Well, we can talk about them in a
2 second, but let's just assume that this is the factual
3 scenario. In June, or December of 2010, when Mr. Friedman
4 is closing the office or moving the office, whatever it is
5 he's doing, he decides no point in moving computers that are
6 old and have no value. So he -- and being aware of whatever
7 level of savvy he has as to what the corporate policy
8 was, being aware that the backup tapes exist somewhere, he
9 says no big deal and throws them out.

10 And then it turns out that some of the
11 computers, you don't know who they belonged to. They
12 belonged to somebody at XU. Some of their computers, it
13 seems, and I'm not actually sure Mr. Friedman knows this,
14 but it seems like he knew who two of them belonged to or
15 something.

16 So then after they are thrown out a year later,
17 you hear about it, Mr. Schuman hears about it, everybody
18 hears about it, and so there's an effort made to go back
19 and, you know, no harm here, because all the information is
20 somewhere else. And it turns out that the assumption that
21 all of the information is somewhere else is wrong because,
22 you know, for whatever reason, it cannot be retrieved
23 anymore.

24 Assuming that's the factual scenario, it seems
25 reasonable to conclude that documents that would have been

1 reviewed or potential responses to discovery have been lost.

2 MR. CANTINE: No. Well, let me -- let me -- two
3 things.

4 Number one, the documents that were on the
5 backup tapes are not destroyed in a sense. They are just --
6 we now know they are in inaccessible due to issues with the
7 QuickPlace.

8 THE COURT: Is there something more than a
9 metaphysical distinction there?

10 MR. CANTINE: Well, the first question is was it
11 reasonable for Mr. Friedman to throw the computers out
12 because he thought all the data was on the backup tapes, and
13 clearly, that's what he thought.

14 THE COURT: Right now I'm saying I will give him
15 credit for that.

16 MR. CANTINE: Okay. We find out a year later or
17 how many months later, okay. We find the backup tapes.
18 Unfortunately, we can't get the data off of that due to no
19 fault of our own. It's reasonably inaccessible under the
20 Federal Rules, and you really don't have an obligation to
21 try to get information that is not reasonably accessible off
22 of these types of backup tapes.

23 Now, the question is, were there data -- was
24 there data on these desktops at the time they were
25 discarded? And we don't know that, but under what Mr. Mason

1 has told us is that everything that was on the desktops
2 ended up in QuickPlace. All right? Or in some other
3 repository. Mr. Rutberg -- he found documents from
4 Mr. Rutberg's desktop and we produced those.

5 THE COURT: And I'm assuming it's the case, tell
6 me if there is something wrong with this assumption, that if
7 the desktops had not been destroyed, documents that might
8 have been copied into QuickPlace that would be inaccessible
9 there would not be inaccessible on the hard drives or
10 whatever.

11 MR. CANTINE: They may or may not be, but they
12 may not have been there, because once you save it to
13 QuickPlace, you delete it off your desktop.

14 The testimony was certain people may have worked
15 on drafts on their local drive, but once it was done, it
16 went to the repository, so that everybody could get access
17 to it. There wouldn't be any reason to save the earlier
18 drafts. Otherwise, your desktop just gets loaded up like
19 mine does. Right?

20 THE COURT: Well, I was going to say, most
21 people don't regularly delete everything once it goes to a
22 library.

23 MR. CANTINE: But when they are working
24 collectively, there was revision control, document control.
25 It was important to track all of this stuff and which

1 version they were working on at the time, and so that I
2 think, and Mr. Mason can tell you what his practice was at
3 least with respect to that. But there's no evidence that
4 there was any data on those desktops at the time that they
5 were thrown away.

6 THE COURT: Well, there's no evidence because
7 they were destroyed.

8 MR. CANTINE: I know. But the counter evidence
9 that anything of importance would have been on the backup
10 tapes and unfortunately now they're inaccessible. But let
11 me stop.

12 And what Mr. Friedman -- the only two
13 individuals I believe he identified as possibly those backup
14 tapes or the desktops came from was Mr. Steinhoff and
15 Mr. Rutberg.

16 Mr. Mason told you he did find documents on the
17 backup tapes from Mr. Rutberg's desktop computer and those
18 were produced to Cisco. So the only one we know or we
19 suspect that was thrown out that we don't know about is
20 Mr. Steinhoff.

21 THE COURT: I can't recall, but wasn't
22 Mr. Rutberg, wasn't he somebody that was on the left-hand
23 side of the dotted line?

24 MR. CANTINE: Correct.

25 THE COURT: Okay.

1 MR. CANTINE: So that's consistent with
2 Mr. Mason's testimony, that the computer would have reached
3 in and grabbed the documents off his desktop, and that's why
4 we're able to find them on the backup tapes.

5 THE COURT: Because when the computer grabs them
6 off the desktop, they are saved somewhere, that ends up in a
7 different space than the QuickPlace --

8 MR. CANTINE: I've believe that's correct, your
9 Honor, because now you don't have to go through QuickPlace
10 to get to that document. It's just saved on the tape under
11 some folder in Mr. Rutberg's name, I believe is how it would
12 work.

13 THE COURT: All right. All right. What else?

14 Before going to the bigger issues, is there
15 anything else you want to say about the Mason testimony
16 or these six or half a dozen, more or less, desktop
17 computers.

18 MR. CANTINE: No. I think I said everything,
19 that the company practice was to save it. There's no
20 evidence that they did not follow that practice. And this
21 issue about whether or not the data was accessible or not
22 didn't come up until much later, and there was certainly no
23 bad faith in -- we did everything we could to try to get
24 that data off those backup tapes and unfortunately, weren't
25 able to.

1 THE COURT: The "we," so Mr. Cantine's good
2 faith and bad faith really isn't an issue here. All
3 right. If you're done, I have one or two more questions for
4 Mr. Schuman.

5 MR. CANTINE: Okay.

6 MR. SCHUMAN: Yes, your Honor?

7 THE COURT: So do you think there's any evidence
8 of bad faith?

9 MR. SCHUMAN: Well, I do, your Honor. I think
10 that all of this should have taken place when the case was
11 filed, if not before. If the shoe were on the other foot,
12 we would be in big trouble.

13 When we received notice of this case, Cisco did
14 a lit hold. We did images of all the computers.

15 THE COURT: Well, the question here is not
16 really who had a better policy. I mean, is there -- what's
17 your evidence that there's any bad faith? Just the fact
18 that it happened?

19 MR. SCHUMAN: The evidence of bad faith with
20 respect to the desktop computers, your Honor?

21 THE COURT: Yes.

22 MR. SCHUMAN: I think the knowledge as the CEO
23 of the company very personally involved in this litigation,
24 knowing that there is pending litigation, destroying those
25 computers, should not have happened. And I think that's bad

1 faith. The inventor computers should not have been
2 destroyed.

3 THE COURT: When you say the inventor computers,
4 but other than Steinhoff and Rutberg, you're just guessing.
5 Right?

6 MR. SCHUMAN: Mr. Friedman could not tell us
7 the names of the other desktops that were destroyed, but we
8 know from the production we got that we did not get any
9 backups of any desktops for Mason or Nevin or the other
10 inventors.

11 THE COURT: But they could have been destroyed
12 somewhere before 2010?

13 MR. SCHUMAN: That is possible, your Honor.
14 Those computers could have been destroyed earlier. And I
15 think, your Honor --

16 THE COURT: So basically, though, your evidence
17 of bad faith is Friedman decided to destroy these computers.
18 He knew about the litigation hold from his first
19 conversations with the attorneys at Stroock. And he hadn't
20 checked to make sure that whatever was on these computers
21 was also on the backup tapes?

22 MR. SCHUMAN: I think that's a fair summary of
23 the bad faith piece of it with respect to these computers.

24 THE COURT: Okay.

25 MR. SCHUMAN: And prejudice, your Honor is

1 focusing just on bad faith. I think prejudice is a separate
2 question and what we do about prejudice.

3 THE COURT: Well, I was just focusing on bad
4 faith because while I have not studied it, my impression is
5 that when you're considering a motion like this and just
6 generally the loss or potential loss of evidence, there's a
7 wide range of things you are supposed to consider, including
8 bad faith and whatever. That obviously prejudices something
9 else.

10 MR. SCHUMAN: Right. Obviously, we moved for
11 terminating sanctions, and since we filed that motion, new
12 evidence has developed regarding, for example, the destroyed
13 files from Mr. Friedman's computer. Some of those have been
14 recovered. We received a supplemental production of some of
15 those.

16 I actually think the evidence hasn't changed. I
17 think it's clarified and firmly supports our position with
18 respect to these destroyed computers, which was the
19 centerpiece of our motion. But your Honor is right, other
20 than terminating sanctions, which I do think bad faith is a
21 requirement for terminating sanctions, the prejudice from
22 the post-litigation destruction of evidence can be addressed
23 in other ways, including by things like adverse inferences.
24 I do think bad faith is a prerequisite to a terminating
25 sanction.

1 THE COURT: All right. Okay. All right. Well,
2 so I guess, unless Mr. Cantine, you want to say anything
3 more about that topic, we can go on to the more -- the other
4 thing that I got all the declarations about last night at
5 5:00 o'clock. And I read them.

6 I really have only one concern, which was --
7 well, let me keep my concern to myself. What do you have to
8 say?

9 MR. CANTINE: So just to explain what we did, we
10 provided you Mr. McCraw's declaration to memorialize the
11 understanding or the agreement that we have with Cisco on
12 the metadata. I gave you the Lofley declaration, which is
13 from our litigation support person saying that she gave the
14 metadata in accordance with the agreement, and then we have
15 Mr. Harris' declaration, which is probably the more
16 important of the three.

17 THE COURT: Well, I mean, I took from them
18 generally speaking that the sum total of these declarations
19 is, in terms of metadata, we've given them everything we can
20 give.

21 MR. CANTINE: That's correct. And part of the,
22 I think the disconnect here, perhaps, maybe, or the issue
23 is, when Mr. Harris recovered, whatever term you want to
24 use, the data off Mr. Friedman's computer, the e-mails and
25 the documents that were the subject of this motion, we did

1 it in what he calls a forensic manner rather than a way you
2 would grab documents off an image for purposes of a document
3 production. And so the data that he gave us came from the
4 manner in which he got the data off the image, and that's
5 all the metadata we provided to them.

6 To get, I think, what they are really after
7 would require going back to square one and processing
8 that data in a manner in which you would do for a
9 typical document collection as opposed to only forensic
10 examination. So if there's a disconnect in terms of the
11 metadata we provided them, I think that's where it falls.
12 But we have given them all the metadata that we were able
13 to get from the data, from the records in the manner in
14 which they were provided to us for Mr. Harris. I hope that
15 makes sense.

16 THE COURT: Well, it makes just enough sense
17 so I can reach a conclusion so that I got your point that
18 you've done what you could have done. But I guess one of
19 the questions I would have is, I may have misinterpreted
20 what you just said, or are you saying that if a different
21 approach had been taken to this, you know, you treat it
22 more like a discovery obligation as opposed to whatever
23 it is, that some of this metadata would have been
24 recovered?

25 MR. CANTINE: I don't want to go that far. It

1 may have been. There may have been additional metadata that
2 we could have gathered if we had done this in a typical
3 document collection and production type of thing, but this
4 started out as a forensic examination where they alleged all
5 these documents and e-mails had been deleted, and
6 Mr. Harris, our expert, said, well, no, they hadn't been
7 deleted. Here they all are. And he grabbed them off the
8 image for us and we produced them.

9 THE COURT: Well, and it started off partly
10 because I had the -- you know, because there was a
11 disconnect and I was trying to get -- to make sure that the
12 disconnect wasn't just lack of information exchange, and
13 which is the reason why I asked you to produce these things
14 that your expert was saying he recovered and their expert
15 had not.

16 Am I correct in thinking that both Ms. Phillips
17 and Mr. Harris were starting from the same point?

18 MR. CANTINE: Exactly. They each had the
19 exact same image of Mr. Friedman's computer, which raises
20 another issue. All right. They have access to that
21 metadata because they are looking at the same image that
22 Mr. Harris is. This whole argument about they can't figure
23 out the source file or the filing or whatever, you know,
24 they want us to do what they could have done themselves.
25 It's there.

1 THE COURT: Well, and so that does get into the
2 actual question I had, which is, Mr. Harris' affidavit or
3 declaration basically said, I think, that where they had a
4 file identified, and let's say it was, you know, Phil Rovner
5 bracket one dot something or other, that he then went and
6 got -- looked on the computer and got Phil Rovner dot
7 something or other. And I thought what I had interpreted
8 originally when this came up was that he had recovered Phil
9 Rovner bracket one dot something or other.

10 And part of the claim was from Cisco was that,
11 well, we can't match that with something that we were
12 produced in discovery. And so I gathered Mr. Harris
13 recovered Phil Rovner dot something or other and said, so,
14 here. This is to prove it's there. And it would be the
15 same as the bracket one version.

16 And I guess while I understand, I think,
17 perfectly well that if you have a file that's named Phil
18 Rovner dot something or other and you create a new one, you
19 download a new one, and it's going to put the bracket one
20 in, it does not seem to me that it follows that after you
21 create it, you now have on your computer Phil Rovner dot
22 something and Phil Rovner bracket one dot something, that
23 you can't go forward with one or the other of them and it
24 will keep the same name, but it will now be a different
25 version.

1 Do you understand what I'm saying?

2 MR. CANTINE: I think I understand and I think I
3 know where this issue is coming from, and let me explain it
4 to you this way. And I think if you go back and look at
5 what Mr. Harris said in some of his earlier declarations and
6 certainly what he said when he was here on the stand, it
7 becomes a little clearer.

8 The way Mr. Friedman accessed his documents is
9 not necessarily the way, you know, certainly I access mine,
10 maybe you access yours. He wasn't simply going into his
11 hard drive and double-clicking on a document and opening it
12 up. His documents were stored someplace else, at another
13 repository, and he would use Internet Explorer to open up,
14 let's say, a Word document.

15 THE COURT: Right.

16 MR. CANTINE: Phil Rovner doc. And so that Phil
17 Rovner doc is sitting over there in this repository. He
18 migrates to it through Internet Explorer, double clicks and
19 opens it. Internet Explorer then opens that document and
20 saves it with a temporary name. That's where the bracketed
21 one comes from.

22 THE COURT: Right.

23 MR. CANTINE: And that temporary file is
24 temporarily stored in a temporary folder. That bracketed
25 one document is saved there temporarily. He reads the

1 document, does whatever he does with it, and then closes it,
2 and closes out of Internet Explorer.

3 Internet Explorer then empties that folder, that
4 temporary folder, so that Phil Rovner bracketed one doc no
5 longer exists. It was a temporary file that the computer
6 stored there while you were looking at it, but when you
7 closed out of Internet Explorer, that document went away.

8 So Mr. Harris cannot go back and recover what
9 the bracketed one was. He explained those are all temporary
10 files. Internet Explorer was set up to delete those
11 temporary files when you closed out. Otherwise, the
12 computer gets bogged down with all these temporary files.

13 What he did was, he went to the hard drive and
14 said, well, where's that Phil Rovner doc? And that's what
15 we pulled up and provided to Cisco.

16 And based on the manner in which Mr. Friedman
17 used his computer and the bracketed one and all of his
18 experience, he's saying those are the same. That temporary
19 file with the bracketed one would have been that one.
20 They're the same. And that's what we provided them.

21 THE COURT: Okay. Then maybe I misread the,
22 the document or affidavit somewhere along the way, because
23 what I thought he was saying was that he recovered the
24 temporary file.

25 MR. CANTINE: No.

1 THE COURT: Not that he had matched it to some
2 other file --

3 MR. CANTINE: No.

4 THE COURT: -- basically by just removing the
5 bracket.

6 MR. CANTINE: No. What he recovered was the
7 underlying source file, the Phil Rovner doc. And he's
8 saying based on the manner in which Mr. Friedman used his
9 computer and the way Internet Explorer was set up, you know,
10 and based on all my experience, it's my opinion that this
11 Phil Rovner doc here I found on the hard drive was the same
12 one that had that bracketed one around it that was a
13 temporary file that was deleted automatically by the
14 computer.

15 THE COURT: Okay.

16 MR. CANTINE: I'm sorry. I guess we could have
17 tried to make that clearer.

18 THE COURT: Well, you know, maybe I will go back
19 and --

20 MR. CANTINE: Okay.

21 THE COURT: -- look at it. But I did -- I had
22 been under the impression that he was essentially recovering
23 deleted files, not fully non-deleted files and saying it's
24 the same as a deleted file.

25 MR. CANTINE: That's what he did for the

1 documents. He said, because those -- the bracketed number
2 ones, and their expert, Mr. Phillips, agreed with me on
3 this. They are just not there anymore. They're gone. But
4 based on all the evidence and the circumstances and how he
5 used his computer, it's reasonable to conclude that this
6 temporary file with the bracketed one is the same as the
7 underlying source file I found on the computer. And so
8 that's what we provided.

9 THE COURT: All right. So what else do you want
10 to say?

11 MR. CANTINE: And just with regard to this
12 latest declaration, you know, I think there are a couple
13 points I want to make.

14 Number one, they argue about these two Allstate
15 presentations and some alleged hidden data.

16 THE COURT: Right.

17 MR. CANTINE: Mr. Harris, I would say rather
18 emphatically, says --

19 THE COURT: Well, emphatically, but not actually
20 comprehensively to me.

21 MR. CANTINE: Okay. Let me see if we can help
22 you there.

23 THE COURT: I mean, where he said the hidden
24 data refers to file titles or column headers or something, I
25 didn't -- I saw he wrote it, but I didn't understand --

1 MR. CANTINE: Okay.

2 THE COURT: -- maybe I didn't spend enough time
3 looking at it, but I couldn't actually figure out what he
4 was talking about.

5 MR. CANTINE: I think if you look at -- that
6 will keep running, but if you look at page 4 in the booklet
7 I gave you, this is a printout.

8 THE COURT: Oh, page 4 of the booklet today?

9 MR. CANTINE: Yes.

10 THE COURT: Okay. Hold on a minute.

11 (Pause.)

12 MR. CANTINE: So the --

13 THE COURT: I'm sorry. Just one second.

14 MR. CANTINE: Okay.

15 THE COURT: Scope of the backup tapes?

16 MR. CANTINE: You're looking at Cisco's.

17 THE COURT: Oh, sorry, sorry. I've got it open.

18 Right. Okay. Thank you, Mr. Cantine.

19 MR. CANTINE: Okay. So what Mr. Harris is
20 saying, Cisco makes the assertion, or Mr. Feagley, I
21 believe, makes the assertion that there was some hidden data
22 in this file, and what Mr. Harris explains is that alleged
23 hidden data are is the three column headers you see on this
24 chart. One is Organization's Client, KnowledgeSHARE
25 Platform and Organization on the right.

1 THE COURT: Okay.

2 MR. CANTINE: Those are the three headers.

3 So the bottom line is it's not hidden. This is
4 a printout. You can see it. It says Organization's Client,
5 KnowledgeSHARE Platform and Organization. Those are the
6 columns that Cisco is asserting are somehow hidden and here
7 they are in the actual presentation.

8 The bottom line is what Mr. Harris says is that
9 the two Allstate presentations, which are the subject of
10 Mr. Friedman's declaration, are identical in content and the
11 metadata is identical.

12 So to suggest that there's some hidden field and
13 that this is some smoking gun I think is flatly refuted by
14 Mr. Harris. I mean, it's not hidden. It says it right
15 there.

16 THE COURT: Hold on just one minute.

17 MR. CANTINE: Okay.

18 (Pause.)

19 THE COURT: All right. Well, I see the thing
20 that was in the Feagley declaration for Slide No. 16, the
21 words do match the headings of these three columns.

22 MR. CANTINE: And for the record, this is
23 discussed at paragraph 12 of Mr. Harris' declaration, your
24 Honor.

25 THE COURT: All right. Hold on just a second.

1 All right.

2 MR. CANTINE: Okay. And so we also provided you
3 a slide in the booklet there, I think it's on page 6 of --
4 again, this is Cisco's assertion that there's somehow
5 something different in this Allstate presentation that we
6 recently provided them than what we had originally provided
7 them in discovery.

8 And on the left-hand side is a copy of the same
9 page 16 from our original production, and on the right is
10 that same page, 16, from the supplemental production.

11 THE COURT: And your point is it's identical on
12 both sides?

13 MR. CANTINE: Correct.

14 THE COURT: All right. That point I understand.

15 MR. CANTINE: Okay. Thank you.

16 And, again, there's no hidden data that somehow
17 this smoking gun, this later produced document, Mr. Harris I
18 think establishes, like I said, emphatically that's just not
19 true. The content and the metadata are identical between
20 the two documents, so no smoking gun.

21 Mr. Feagley, in his declaration -- again,
22 Mr. Feagley is an in-house person at Cisco. We don't really
23 know what his credentials are. He has been working in this
24 area I guess for a number of years, but I would suggest he
25 does not have the same level of knowledge as Mr. Harris, and

1 so Mr. Harris has addressed all the points he has raised.

2 The arguments at paragraphs 10 to 13 of the
3 Feagley declaration --

4 THE COURT: Well, actually, you said he's Cisco.
5 But he's actually Morgan Lewis.

6 MR. CANTINE: Did I say Cisco? I meant Morgan
7 Lewis.

8 THE COURT: But your point about his expertise
9 remains the same.

10 MR. CANTINE: Thank you, your Honor.

11 To sum up, Mr. Harris confirms, there was some
12 suggestion the last time we were here, there was a
13 suggestion in the Feagley declaration that somehow these
14 documents that we produced, that Stroock produced in
15 response to your order, came from somewhere else. That they
16 weren't -- didn't come from -- like we were trying to slip
17 one in.

18 THE COURT: I thought I indicated at the last
19 hearing that I wouldn't be concerned about that.

20 MR. CANTINE: No, no, and I appreciate that, but
21 it's a serious allegation, it's a serious assertion.
22 They're essentially arguing that Stroock, my firm, myself,
23 is manipulating data. And I can tell you, we take that
24 accusation very seriously, your Honor.

25 THE COURT: As well you should.

1 MR. CANTINE: And we spent a lot of time and a
2 lot of meetings over the last few days talking to people
3 internally about those.

4 But hopefully, to put it to rest, Mr. Harris
5 confirms in his declaration that every one of the files we
6 produced to Cisco came from Mr. Friedman's computer. Cisco
7 can see the source of those documents for themselves. And
8 he addresses all of the points raised in the Feagley
9 declaration in his recently filed declaration, and I would
10 suggest that this assertion of a smoking gun with regard to
11 this Allstate presentation just is hollow.

12 THE COURT: All right. So I will hear from
13 Mr. Schuman as to whether or not he has got a smoking gun,
14 and if so, what it is. Okay?

15 MR. CANTINE: Thank you.

16 THE COURT: All right, Mr. Schuman.

17 MR. SCHUMAN: Your Honor, I think you hit it on
18 the head. We were not casting aspersions or making
19 suggestions or allegations against Mr. Cantine. The reason
20 why we have been pursuing the metadata is because what has
21 happened here is we identified specific deleted files,
22 including files that have these bracketed numbers, which
23 Ms. Phillips testified in her declaration and here on the
24 stand last Monday means they either are or could be
25 different versions of the document.

1 And what we have gotten back in response is, to
2 use your example, not, here is Phil Rovner paren one dot
3 doc, which is the deleted file we identified in our motion.
4 What we got back is Phil Rovner dot doc with a lot of
5 explanation that this is really is the same document.

6 We acknowledged in our moving papers on this
7 motion back in October that for 24 of the 35 specifically
8 identified files, we were able to find other similar file
9 names in the production, including for the Allstate
10 presentation. But what we did not find was Allstate 03,
11 0603 bracket one dot doc. That's the file we've been
12 searching for. That's the file that I think your Honor
13 correctly hit it on the head, they claim --

14 THE COURT: So that kind of -- because one of
15 the things that frustrated me at the beginning was, I've got
16 Ms. Phillips on the one hand and Mr. Harris on the other
17 hand, people who I regard as being -- who have enough common
18 background that they ought to be able to come to the same
19 conclusion about something, and so I couldn't really figure
20 out why they couldn't. But now it's making more sense to me
21 because Ms. Phillips was saying, I can't find the bracket
22 one version, and I thought Mr. Harris was saying I can't
23 find the bracket one version, but that's not what Mr. Harris
24 was saying.

25 MR. SCHUMAN: That is not what Mr. Harris is

1 saying. And, furthermore, Mr. Harris is saying that the
2 bracketed one version always necessarily must be an
3 Internet, temporary Internet file from Mr. Friedman viewing
4 this document over the Internet, and Ms. Harris said on the
5 stand here last Monday that that is not always the case.

6 So there are these specifically identified files
7 and Mr. Harris has not recovered those files. He has argued
8 he has recovered those files and identified similar file
9 names, but that does not really get us much beyond where we
10 were when we filed this motion because for most of the files
11 we identified as having been deleted, we acknowledge that
12 there were similarly named files elsewhere in the
13 production.

14 THE COURT: Right. And that is part of the
15 reason why I asked Mr. Cantine to produce some of these
16 things to you, was because the fact that you couldn't find
17 similarly named files. Never mind. Yes.

18 MR. SCHUMAN: So the files identified in our
19 motion are gone for good is what I understand the record
20 evidence to be. However, Mr. Harris and the XU side has
21 said, well, we have these other files, and based on these
22 pictures, they're the same.

23 I don't want to get too in the woods. I will
24 respond to any question the Court has, of course, but the
25 pictures you're looking at on the screen, those are what

1 they have access to, which is the native PowerPoint itself.
2 These are PowerPoint presentations to Allstate.

3 What we get in discovery is not that. What we
4 get is a TIFF image, a picture along with metadata. The
5 metadata for the version of the Allstate presentation in the
6 supplemental production, the one on the right, is different
7 in several respects from the one on the left.

8 THE COURT: Is this the, what's on page 6 of
9 Mr. Harris' declaration? Is that the -- this is the
10 application level metadata?

11 MR. SCHUMAN: Correct.

12 THE COURT: Is that --

13 MR. SCHUMAN: And if you go, your Honor, to
14 paragraph 9 of Mr. Feagley's declaration, which Harris is
15 responding to, you know, this is a picture of the metadata
16 fields as we received them and they're different. The file
17 size is different. The size of the file is different. And
18 in the one on the left from the supplemental production, as
19 I think we've already exhaustively covered here, it has this
20 hid -- hid content field.

21 THE COURT: Well, leaving aside -- well, first
22 off, I guess the hidden content view, is there -- you have
23 Mr. Cantine and his expert have said this is no big deal.
24 It's less than no big deal. It's no deal at all.

25 Is there something wrong with what the expert,

1 Mr. Harris, is saying to me about what the stark hidden
2 content means?

3 MR. SCHUMAN: There is, because the starting
4 point for that comment is that the one on the right is
5 actually the one that we identified in our motion. In other
6 words, it goes back to the first point we were just
7 discussing, your Honor. The bracket, the Allstate
8 presentation bracket one is the file we've been searching
9 for all this time, and what we're looking at here, on the
10 left, is what they've produced earlier, and on the right is
11 what Mr. Harris tells us is, or must be Allstate
12 presentation bracket one, but that's not actually what it
13 is.

14 THE COURT: So you actually -- what you are
15 saying is, you actually expect these two to be the same
16 because basically what Mr. Harris has retrieved is a file
17 with the identical name to presumably what had -- I mean, he
18 has basically just retrieved it a second time.

19 MR. SCHUMAN: Correct. And the part that I
20 don't understand, and I appreciate the lawyer's job is to
21 help the Court, but the part I don't understand is how if
22 all Mr. Friedman was doing was accessing these documents
23 through the Internet, where he didn't actually have a big
24 store of documents on his computer, I don't understand what
25 files Mr. Harris is recovering from that hard drive,

1 Mr. Friedman's hard drive.

2 Again, this is the reason why -- because if the
3 point is, your Honor, as Mr. Cantine said, Victor Friedman
4 used his computer differently than the rest of us. He used
5 it to access documents stored elsewhere on another computer
6 of his or on some other database, wherever they were, then
7 what you would expect to see on his hard drive is only a big
8 cache of these temporary Internet files because, according
9 to XU and Mr. Harris, he's just viewing them, and when he
10 exits his browser, they are all automatically deleted.

11 Okay. I understand that. If that's the
12 representation that's how Mr. Friedman was using his
13 computer, then one would not expect to find any of these
14 files from Mr. Friedman's hard drive that they are
15 retrieving and saying, ah, that's the same as that Phil
16 Rovner one bracket dot dot.

17 So this is the reason why, your Honor, we've
18 bothered the Court with these declarations and have been
19 pursuing this metadata, because we don't know what the file
20 on the right -- we don't know whether the file on the right
21 and after all this work on this motion by the Court and the
22 parties -- these are not the files that we listed in our
23 motion. That's the problem. Those files are gone for good
24 and I think you heard Mr. Cantine say that today. Those
25 files are gone for good.

1 XU and Mr. Harris would have you believe those
2 are just temporary Internet cache files that, of course,
3 they're gone for good. They can never be recovered. And
4 what we're getting are pieces of information like, here's
5 the file name, and I'm going to tell you based on my opinion
6 that this is the same as the file that you identified in
7 your motion. That's the part we have trouble with.

8 THE COURT: Well, as I recall -- I don't recall
9 entirely, but basically the list of files that you couldn't
10 match up, they all had a bracket one or a bracket two with
11 the name. Right?

12 MR. SCHUMAN: All 35 of the files had version
13 numbers in them like that, yes.

14 THE COURT: All right.

15 MR. SCHUMAN: Some had bracket two, some had
16 bracket one. In some instances, we had a file name with a
17 bracket one and then a file name with a bracket two.

18 THE COURT: Right.

19 MR. SCHUMAN: Different versions.

20 THE COURT: Well, different names.

21 MR. SCHUMAN: Different file names.

22 THE COURT: Right.

23 MR. SCHUMAN: Which -- yes.

24 THE COURT: I mean, and it seems almost
25 inconceivable to me that those files, the 35 of them, were

1 not -- wait a second. I put in a lot of negatives here.

2 I think those 35 files, I mean, it seems to me
3 almost a certainty that they were created in the manner that
4 XU has said that they've been created, which is Mr. Friedman
5 pulling things from the Internet or using the Internet
6 Explorer, somehow or other getting documents from somewhere
7 else, because nobody in their right mind, if they are naming
8 the file themselves, puts the bracket one in there. That's
9 something that, you know, happens automatically.

10 MR. SCHUMAN: When you open a file and you edit
11 it and you save it, there's already a file name saved there
12 and you save over it, that's when it adds the bracket one,
13 bracket two. That was Ms. Phillips' testimony on Monday.

14 So wherever he's accessing them from, and
15 obviously your Honor is free to accept the testimony that he
16 was accessing these all from the Internet, I actually don't
17 think it's correct that every file he has was coming from
18 the Internet when we're looking at his office desktop. But
19 be that as it may, when you go edit and go hit save for a
20 file, if there's already a file name there, you're right.
21 You or I don't personally add bracket one or bracket two.
22 We might add some other notation to indicate to ourselves
23 it's a different document. The system does that.

24 And that's why these files with these bracketed
25 numbers per Ms. Phillips' testimony may very well be

1 different versions. And I don't want to complicate this
2 further. If it's in the declarations, you can also figure
3 out whether there are different contents or things like
4 hashtags.

5 THE COURT: Well, since they're gone, you don't
6 have them.

7 MR. SCHUMAN: What she does, she looks at two
8 other files I think that aren't gone and says, look, these
9 are two files on Mr. Friedman's computer with the same file
10 names. They have different hashtags. They're different.
11 Right. We can't compare --

12 THE COURT: Wouldn't they have -- would they
13 have different hashtags just because they have different
14 names?

15 MR. SCHUMAN: I think they might have different
16 hashtags if they have different content.

17 The point of hashtags is, the reason you would
18 turn to hashtags for something like this is, if they have
19 the same name, and then you can look and see that they have
20 different hashtags and you know they're different.

21 THE COURT: But having the files be named
22 differently so --

23 MR. SCHUMAN: You may not need to resort to
24 hashtagging if the files have different names unless you
25 get into this argument like we're having here, which is,

1 what is the significance of these little bracketed numbers?
2 We're saying they are different versions or could be
3 produced to us, the versions.

4 They say those versions are gone for good, or
5 we're going to give you something else that we think is the
6 actual document you're looking for.

7 THE COURT: Well, there is something to be said
8 for giving -- I mean, for one thing, and I don't know. I
9 can't remember now, but to the extent they give you
10 something that has the same number without the bracket one
11 and it's Mrs., or Mr. Friedman's favorite lasagne recipe,
12 the fact that you don't have a bracket one version probably
13 isn't too important?

14 MR. SCHUMAN: I would agree with you a hundred
15 percent, your Honor, but the 35 files we identified,
16 Mr. Friedman's favorite lasagne recipe along with some other
17 files were not the focus of our motion. Those were also
18 deleted and gone for good.

19 What we identified in our motion, there were 35
20 files which, by virtue of their file names, suggest
21 relevance to this litigation.

22 THE COURT: Well, and so you know what the -- so
23 let's assume that for the sake of argument, that you're
24 right, that there could be, unless you assume there is,
25 another version that is slightly different that now is not

1 retrievable, or it's gone.

2 Are any of the ones, the 35 files that you have
3 on such a hot topic that the fact that some, you know,
4 iteration of it is gone makes a difference?

5 Do you understand what I'm trying to ask?

6 MR. SCHUMAN: If your Honor is asking again
7 about what are the smoking guns here, is that the question?

8 THE COURT: Well, actually, I guess the way I
9 was asking was slightly different. But, yes, let's actually
10 just go with smoking guns.

11 MR. SCHUMAN: Well, the way I would answer that
12 question, your Honor, is we've asked Mr. Cantine's firm to
13 stipulate that we can amend our trial list with a number of
14 these documents from the supplemental production. What is
15 the smoking gun? You might have a different view and the
16 jury might have a different view and we might have a
17 different view.

18 You know, I mentioned a couple of documents when
19 we were here on Friday, this one being one of them. Mr.
20 Cantine has come in and given you a demonstration that to
21 the naked eye, these appear to be the same.

22 We also have this document from Cohen's
23 Hospital, which they produced in their supplemental
24 production, which from all the metadata we have, which I
25 understand we've got all we're probably going to get now,

1 the author of that document is Alex Friedman, and we want to
2 add some of these documents to our exhibit list. And
3 somebody will decide whether they're smoking guns or whether
4 they are really irrelevant.

5 THE COURT: So just tell me, because I can't
6 even begin to figure it out. If the author of, what, the
7 PowerPoint is Alex Friedman?

8 MR. SCHUMAN: No. The two documents I mentioned
9 on Friday.

10 THE COURT: I can't remember them now.

11 MR. SCHUMAN: One of them was this PowerPoint,
12 and Mr. Cantine has come in and given you a demonstration of
13 how these really are the same.

14 The second document, separate document, your
15 Honor, on the spreadsheet that they attached to the papers
16 that they filed at 5:00 o'clock yesterday --

17 THE COURT: Yes?

18 MR. SCHUMAN: -- there's a spreadsheet. It's an
19 attachment to, I believe --

20 THE COURT: Mr. Rovner's letter?

21 MR. SCHUMAN: It's certainly an attachment to
22 the letter. It's one of the declarations. It's Exhibit A
23 to one of the declarations. I apologize.

24 THE COURT: Which item is it?

25 MR. SCHUMAN: It was just attached to

1 Mr. Rovner's letter, your Honor, the spreadsheet attached to
2 Mr. Rovner's letter, Exhibit A to the letter.

3 THE COURT: And --

4 MR. SCHUMAN: Summary of originals.

5 THE COURT: Right. I've got it.

6 MR. SCHUMAN: Okay.

7 THE COURT: Which item?

8 MR. SCHUMAN: The item I'm referring to on here,
9 your Honor, is item 11, Cohen's Children Hospital, 411.11
10 doc. That document was produced for the first time as part
11 of their supplemental production, and on its face it appears
12 to be a letter from to Mr. Friedman to Cohen's Children's
13 Hospital, talking about things like XU's great technologies
14 and also talking about XU's patent.

15 The custodian of that document -- I'm sorry --
16 the author of that document is Alex Friedman, Victor
17 Friedman's son.

18 THE COURT: So the basic theory here is, and I'm
19 sorry. Did this document appear on -- okay. Strike that
20 question.

21 I take it that document, is that document on
22 XU's witness list?

23 MR. SCHUMAN: It is not, and it was produced
24 after the pretrial order was filed, where the parties made
25 their exhibit list.

1 THE COURT: Okay. And so your theory here is
2 that essentially Victor Friedman is busy creating evidence
3 that he could use to show, you know, maybe some secondary
4 considerations of nonobviousness or something?

5 MR. SCHUMAN: Well, we have another letter which
6 we've already covered and I think there's more than one
7 example of that kind of behavior, yes.

8 THE COURT: But I mean, but basically, that's
9 the reason you want to, why you would be willing to add it
10 to your witness list is, essentially, false evidence.

11 MR. SCHUMAN: Correct.

12 THE COURT: Okay.

13 MR. SCHUMAN: And it's a little late in the game
14 to be getting this. We would be taking some risk in front
15 of a jury confronting Mr. Friedman with a piece of evidence
16 that we did not have during the course of discovery, but I
17 think that's a decision for the trial team to make. But for
18 present purposes, some of these documents that were produced
19 for the first time of this spreadsheet, your Honor, that you
20 have in front of you, which they have produced in response
21 to the Court's order. Saying these are the files that are
22 similar to the one that the Court ordered us to produce.

23 For 30 of the 54 files on here, there is no file
24 from their prior production, so 30 of them, there's nothing
25 in that column from the second to the right. These are new

1 documents that we got for the first time in response to our
2 motion for terminating sanctions and in response to the
3 Court's order that they produce these documents.

4 So we've been through those documents and
5 several of them we'd like to add to our exhibit list. That
6 shouldn't be controversial, your Honor. And, you know, as
7 to what is a smoking gun and what's not, I think that's a
8 separate issue.

9 THE COURT: Okay. Anything else?

10 MR. SCHUMAN: The only thing I will add, your
11 Honor, I appreciate the Court's time on this motion. This
12 was a serious motion and was not filed lightly.

13 I do think we established the destruction of
14 relevant evidence, both with these files and also with
15 Mr. Mason's testimony today.

16 The other piece of our motion relates to the
17 testimony regarding the evidence being preserved. I think a
18 fundamental issue here was the lack of a sufficient
19 litigation hold when the case was filed. And this should
20 not have happened and we should not be here on the eve of
21 trial getting supplemental productions based on what a
22 forensic consultant was able to recover and tell us are like
23 the files that were destroyed.

24 These computers never should have been
25 destroyed, and certainly the backup tapes should have been

1 checked when they contemplated bringing the case. They are
2 the plaintiff. They prepared to bring this case.

3 Mr. Friedman testified that he first decided or contemplated
4 litigation in September of 2008, and they filed the case in
5 March of 2009. It's approximately six months, maybe five
6 months.

7 Nothing was done to take steps to preserve
8 evidence here until these computers were destroyed in
9 December of 2010, and I think the record is very clear from
10 Mr. Mason's testimony, it wasn't until December of 2011,
11 after we first learned about these destroyed computers at a
12 deposition, that they first went and looked at the backup
13 tapes.

14 So I think we've established several different
15 ways in several different areas that relevant files had been
16 destroyed, computers with relevant information have been
17 lost. And the prejudice based on the names of the files, I
18 think the case law says that's all we have to do. We can't
19 know what the content of these files were. We can't know
20 exactly what documents were on the computers that were
21 destroyed that shouldn't have been.

22 I think your Honor is correct, that the subject
23 of bad faith requires -- it's a heavy finding, I appreciate
24 that, and a high burden. And I submit that we've met it,
25 but I appreciate the Court's comments, both prior to today

1 and today, and that's why there are other ways to deal with
2 this other than a terminating sanction.

3 We're certainly entitled to an adverse inference
4 with respect to the files here that might be relevant to our
5 102(b) defense. The Allstate presentation we're talking
6 about, this is all about pre-critical date offers to sell to
7 Allstate the patented inventions.

8 So --

9 THE COURT: I was just trying to think ahead
10 here as to the possibilities. I can't remember now. Is
11 there -- I presume that if one gives some kind of
12 instruction about an adverse inference because of evidence
13 being not preserved, that it probably has to be fairly
14 tailored to the specific circumstances.

15 If I thought that were the appropriate thing to
16 do here, what would you -- what would you imagine me telling
17 the jury? And I guess, was there an instruction in the
18 300-odd pages that were submitted that actually had some
19 kind of form on this.

20 MR. SCHUMAN: There was not.

21 THE COURT: Okay.

22 MR. SCHUMAN: And I would agree with your Honor,
23 that it would need to be tailored. I certainly would like
24 to -- I would like to work on a draft instruction and we
25 would submit it.

1 I can't expect that we'll get much agreement on
2 the form of an instruction, but I would agree with your
3 Honor, that the instruction has to be tailored to what we've
4 been able to show regarding the evidence that was -- the
5 file names, for example.

6 And I think, as I've said, I think they relate
7 to more, but they definitely relate to the patent case and
8 they relate to the 102(b) defense, and so therefore the
9 adverse inference instruction would be tailored to and would
10 come in the set of instructions regarding what we have to
11 show, our burden of proof as the, you know, clear and
12 convincing evidence burden of proof for the defendant on
13 102(b). And we've certainly heard enough in this case that
14 they don't think we can't meet that burden. I think the
15 adverse inference instruction would be tailored to that.

16 THE COURT: Well, can you, and I will let
17 you pick your own time, but it would be -- it might be
18 helpful -- I mean, could you submit to me what you would
19 think you, what you have in mind as to what, as best you can
20 right now, not necessarily holding you to it a hundred
21 percent, but what you think such an instruction would look
22 like based on what you think you could prove?

23 MR. SCHUMAN: Can we submit that by close of
24 business tomorrow?

25 THE COURT: Sure.

1 MR. SCHUMAN: We'll do that.

2 THE COURT: All right.

3 MR. SCHUMAN: Thank you, your Honor.

4 THE COURT: All right. Mr. Cantine?

5 MR. CANTINE: I hear a lot of argument, your
6 Honor. I just don't hear a lot of substance. All right. I
7 mean, let's remember where we started, 3,077 content files.
8 Manual defrag. I don't hear Mr. Schuman arguing those two
9 points anymore. They walked off that one, you know, in our
10 first brief.

11 Their own expert admitted that 3,022 of those
12 things were just system files or temporary Internet files.
13 I think we established with Mr. Harris that no manual defrag
14 was run, and even if it had been run, as your Honor
15 established with the questioning, defrag was running
16 automatically on the computer every Wednesday night. That's
17 what Ms. Phillips told us. Defrag is not a wiping program.
18 It does not delete anything. It rearranges data.

19 And so all that would have been rearranged is
20 the data that had changed from Wednesday at 3:00 in the
21 morning or whatever it is to the following Monday, when the
22 image was taken.

23 So this whole defrag thing that they came out of
24 the box with is a nonissue, and I think they've failed to
25 establish any manual starting of that defrag. I think

1 Mr. Harris knocked that one out of the park in four
2 different ways.

3 And Mr. Schuman is right in one respect. All
4 right? These documents, these bracketed one documents, they
5 don't exist. They're gone. There's no dispute about that.
6 They were temporary Internet files, temporary files.

7 Now, Ms. Phillips may argue that there are other
8 ways to create a bracketed one, but Mr. Harris looked at the
9 way and the manner in which Mr. Friedman used his computer,
10 the fact that he was using Internet Explorer. As you said,
11 no one is going to save a document and put in those little
12 bracketed number ones or a bracketed number two. That's
13 just not how you are going to save it.

14 So based on all the evidence, this was
15 automatically created by Internet Explorer, saved in that
16 temporary file and then deleted automatically. Okay?

17 I want to -- two points on that. Rule, Federal
18 Rule of Civil Procedure Rule 37(e), failure to provide
19 electronically stored information.

20 Absent exceptional circumstances, a Court may
21 not impose sanctions under these rules on a party for
22 failing to provide electronically stored information lost as
23 a result of the routine good faith operation of electronic
24 information system. Okay?

25 THE COURT: And I certainly agree that that

1 would apply if there -- if the computers had been destroyed
2 in 2007 and the backup tapes were now not recoverable --

3 MR. CANTINE: No, but we're talking here about
4 these temporary files and Mr. Friedman's computer --

5 THE COURT: Okay.

6 MR. CANTINE: -- that they allege were deleted.

7 THE COURT: Okay. Sorry. I appreciate you
8 bringing me back to what we are actually talking about.

9 MR. CANTINE: Okay. Thank you.

10 So I think it's undisputed that all of those
11 documents, the document names with the brackets were
12 temporary files.

13 I'd also like to, if I may, your Honor, provide
14 the Court with a copy of the default standard for discovery,
15 including discovery of electronically stored information.

16 THE COURT: That's all right. I've got that.

17 MR. CANTINE: Okay. So these became part of the
18 local rules here in Delaware, I believe, on December 8th,
19 2011.

20 THE COURT: I believe so.

21 MR. CANTINE: I'm not suggesting that they
22 control in our case, but I think they are informative.

23 Schedule A lists the type of information that
24 you have no duty to preserve. Number 2 on that list
25 includes temporary files. Number 3 on that list includes

1 temporary Internet files.

2 The point I'm trying to make, your Honor, is all
3 3,077 files that they identified in their opening brief were
4 temporary files created in the ordinary course of
5 Mr. Friedman using his computer. These temporary files were
6 all deleted by the computer automatically in a good faith
7 normal operation.

8 Under Federal Rule 37(e), which is the safe
9 harbor provision, it was intended to cover situations
10 exactly like these.

11 You didn't hear any argument or evidence from
12 the other side that would in any way suggest that
13 Mr. Friedman was supposed to turn off the automatically
14 running defrag program. You heard Mr. Harris talk about how
15 he never heard that happening. In no way would any normal
16 document collection have even attempted to recover or
17 preserve these temporary Internet files. These temporary
18 Internet files were created by the computer itself in its
19 normal operation. There's nothing wrong there. And 37(e)
20 as well as the Delaware rules establish conclusively,
21 there's no duty to preserve those.

22 You know, the first time I read their brief,
23 your Honor, there were 3,077 files deleted, manual defrag
24 run. Extraordinary misconduct is what they argued. False
25 testimony, misrepresentations to the Court, failure to

1 issue a litigation hold, refusal to comply with the Judge's
2 order, your order. That was squarely on my shoulders.

3 Right?

4 They characterize it as the perfect storm of
5 intentional destruction. Those are their words. They said
6 it was staggered, the extent of the destruction. I mean, I
7 read it. I said, oh, this doesn't sound good, but it didn't
8 sound right either.

9 And I think we've established conclusively with
10 Mr. Harris and all the argument we hear, it's just not
11 there. One hundred percent of those documents that they
12 allege, the 3,077 were these temporary files deleted
13 automatically by the computer in its normal operation. They
14 cannot prove a single document was manually deleted. Their
15 own expert admitted it.

16 And we have the e-mails. And we've -- we went
17 back and we found every one of them and we've produced them.
18 They've had all this information for, I don't know, what, a
19 few weeks now? A couple weeks, a week, whatever it is.
20 They've got an army of people, guaranteed, back in
21 San Francisco pouring overall this stuff. And the two
22 smoking guns we have are a presentation with the identical
23 content and this Cohen Children's Hospital letter. Do you
24 know when that was written? 2011.

25 THE COURT: Yes. I kind of gathered it was

1 written April of 2011.

2 MR. CANTINE: And they are now suggesting that
3 this was -- again, I'm trying not to throw names. I said
4 the other day that I thought the other side was being
5 disingenuous and you called me out on it as you should, and
6 I apologize, but they're throwing a lot of bombs here. This
7 Cohen's Children's Hospital now, this letter, they're
8 claiming it's false evidence. But think about that, Judge.
9 False evidence that we never produced.

10 THE COURT: Well, that's the reason why I
11 stopped asking questions, because I credit you with more
12 sense than necessarily the plaintiffs have, so you never
13 know about these things.

14 MR. CANTINE: But to suggest they're now going
15 to put it on their exhibit list when it never saw the light
16 of day, that it's planted? I mean, they'll stop at nothing.

17 THE COURT: And just as a matter of curiosity,
18 do we have this April 11th or April letter? Does one of you
19 have it with you?

20 MR. CANTINE: The Cohen's Hospital letter?

21 THE COURT: Yes.

22 MR. CANTINE: I don't know if it was in their
23 declaration, Mr. Feagley's declaration. I don't remember.
24 I don't think I have a copy of it with me.

25 THE COURT: All right.

1 MR. CANTINE: Okay. So let's -- clearly, I
2 think the opening brief and the 3,077 number was designed to
3 grab everybody's attention.

4 THE COURT: Well, you know, I have not been a
5 Judge that long, but I'm pretty sure this is the first
6 time I've ever seen a motion with the title that this one
7 had.

8 MR. CANTINE: Right. But, you know, so they
9 come out of the gate with all these accusations and then
10 they just walk away from them, like it never happened.

11 I don't hear Mr. Schuman up here talking about
12 3,077 documents. I don't hear him talking about manual
13 defrag. They just --

14 THE COURT: All right. Well, I mean, partly,
15 I'm glad he wasn't just because we kind of covered that
16 topic.

17 MR. CANTINE: I'm just suggesting, your Honor,
18 those are serious allegations and they require serious
19 consideration before they're made in court. And I don't
20 think that happened here.

21 No reasonable forensic expert would ever
22 characterize those 3,000 documents as content files. So we
23 are left with 55 files that had some user generated content,
24 the only possible documents that could in any way be
25 relevant to their claims or defenses.

1 And we went back, and Mr. Harris was able to
2 identify 52 of them. Not the same ones with the brackets,
3 but the ones that we think, based on all the evidence and
4 his review of the record, matched up. And we provided
5 those.

6 And I can't stress enough, your Honor, that the
7 manner in which those temporary files were created, the
8 manner in which those temporary files were deleted, it's
9 undisputed that the rules do not require preservation of
10 those temporary files. That's the safe harbor provision.
11 We were under no obligation, Mr. Friedman was under no
12 obligation to turn off this recommended setting of Internet
13 Explorer.

14 THE COURT: I think I got your point on that.

15 MR. CANTINE: All right. Thank you.

16 So let's talk about bad faith. Again, I think
17 one of Cisco's leading arguments on this bad faith when they
18 came out of the gate was manual defrag. I don't hear them
19 making that argument anymore.

20 THE COURT: Well, you know, that's something
21 that maybe the manual defrag, if it occurred, didn't cause a
22 lot of damage, so to speak, because the defrag is going on
23 all the time. But if I thought that, in fact, it was a
24 manual defrag by -- and maybe that would be a stretch even
25 here, but by a non-savvy computer user, you know, the night

1 before you turn it over, it might indicate something about
2 intent.

3 MR. CANTINE: Possibly, but I think on the
4 evidence and the record we have here, I think we've
5 established we've proved the negative essentially, that
6 we've proved it was not manually run. It was simply the
7 computer doing it, whatever it was set up to do
8 automatically, for which they don't contend it was improper
9 in any way.

10 Let's talk about the e-mails. All right? So
11 they identified 447 e-mails as having been deleted. All of
12 those e-mails have been accounted for. All of those e-mails
13 have been turned over.

14 Among those 447, and you don't hear any
15 counterargument from Cisco in this regard, roughly 190 of
16 them were pure spam. 115 were personal. I think about 80
17 of them had already been produced. About 80 of them were
18 drafts that had never been sent, never saw the light of day.
19 We've produced all of those to them.

20 THE COURT: What you are saying right there,
21 Mr. Cantine, in other words, I don't remember seeing that in
22 writing. I mean, I'm just wondering, was that something
23 that was actually, that kind of characterization, because I
24 remember sort of looking and seeing that there were lots of
25 things, you know, you got a fax, spam. I mean, there were a

1 lot of things that seemed to me to be on their face
2 inconsequential and now I can't even remember. Were all
3 400-odd, were they all from 2008 also?

4 MR. CANTINE: All the e-mails? No.

5 THE COURT: No, no, no. That was the
6 double-deleted.

7 MR. CANTINE: Yes.

8 THE COURT: I'm trying to keep things straight.
9 The e-mails from random times.

10 MR. CANTINE: Correct.

11 THE COURT: Okay.

12 MR. CANTINE: All right. And, so, yes, we've
13 made that assertion, kind of putting those numbers in those
14 various buckets of the spam, personal and the like. They've
15 got them. There's not a counterargument.

16 THE COURT: No. I am just wondering, is there
17 actually in the record, I suppose you just tell me right
18 here, is there someplace where they're characterized?

19 MR. CANTINE: In our brief, they are.

20 THE COURT: Okay.

21 MR. CANTINE: We made those same -- put them in
22 the same kind of buckets in the brief. I have not heard any
23 kind of counterargument.

24 THE COURT: When you say brief, which brief?

25 MR. CANTINE: I suppose it would be our

1 opposition to their opening motion. I think that's all we
2 got on this one motion.

3 THE COURT: Okay. All right. So that would
4 have been back in January, December?

5 MR. CANTINE: Yes.

6 THE COURT: All right.

7 MR. CANTINE: One other point I did want to make
8 on those. Your Honor, in his order, had asked for -- I'm
9 sorry. So we get to the double-deleted; right? There are
10 62 of them.

11 THE COURT: Right.

12 MR. CANTINE: And we've --

13 THE COURT: They don't concern me.

14 MR. CANTINE: Okay. We went back and found --
15 maybe to answer one of the questions you raise in your
16 order, you want to know how many of those were obviously
17 non-pertinent, and I realize we never told you the answer.
18 We've asserted that 12 of those 62 are obviously not
19 pertinent and I have not heard any argument to the contrary
20 from the other side.

21 The litigation hold, I think we've covered. I
22 think your Honor has all you need on that.

23 I don't want to leave some of the other things
24 hanging. They accused us, Stroock, again, essentially, of
25 defying the Court's order for providing more explanation on

1 this Thea Faro letter. We have given you all we know.

2 That's part of the brief.

3 THE COURT: Yes. I'm not concerned about that.

4 MR. CANTINE: Okay. And so let's go to the last
5 one. Right?

6 Even if you -- I don't think there has been
7 any, anything bad happening, but they've asked for
8 terminating sanctions. Right? That's what they think. I
9 don't think they had any alternative in their brief.

10 We produced more than 250,000 documents,
11 700,000 pages in this litigation, from us. We've gotten
12 less from them. The ones that, you know, if you think --
13 you would think there would be a lot more coming from their
14 side when you've got six or seven accused products. But we
15 produced more than that. And so we're ow talking about
16 whether or not there are a couple of documents that didn't
17 get produced.

18 They are claiming that there are 30 documents
19 or something, or there's a handful of documents that are in
20 the -- that we since produced that they never got before.
21 And you know why? It's because those documents were
22 reviewed by us and they were deemed nonresponsive. So they
23 weren't produced originally because they're meaningless, but
24 since we're ordered to produce them now, we produced them
25 now.

1 Mr. Schuman puts a great spin on that, doesn't
2 he? New stuff we've never seen before. Yes, because it
3 wasn't responsive. But we had to turn it over in response
4 to your order, which we did.

5 I think XpertUniverse has been very candid, your
6 Honor. Mr. Friedman testified that he threw those computers
7 out. All right? He told them. He told them when the image
8 was made of his computer. He told them what he was doing
9 with his computer. I don't think there's any evidence of
10 bad faith.

11 And to suggest that this is a smoking gun and
12 this 2011 letter to Cohen's Hospital, the two smoking guns,
13 that is what we're -- you know, two hearings and a ton of
14 expert declarations is what it's all distilled to.

15 I don't think any sanctions are appropriate,
16 your Honor, but certainly not terminating sanctioning in
17 this record. Thank you.

18 THE COURT: All right. Thank you, Mr. Cantine.

19 All right. So I guess the record and the
20 argument on the motion for terminating sanctions, other than
21 the jury instruction you're going to submit tomorrow by
22 5:00, is closed. Right?

23 MR. SCHUMAN: Yes, your Honor.

24 THE COURT: All right. All right. In terms
25 of -- is there anything else on the agenda for either of you

1 this morning?

2 MR. CANTINE: Just if we had any update on
3 whether we're going forward on Monday.

4 THE COURT: I am planning on going forward on
5 Monday. I'm hopeful that by the end of tomorrow I will be
6 able to tell you what we're going forward on.

7 I had thrown out the idea on Friday about
8 whether or not it would make sense to bifurcate damages. I
9 didn't detect a lot of warm fuzzy feelings coming from back
10 either side on that proposal, but I think you did say more
11 or less you had to talk with the client.

12 MR. CANTINE: I can report, again, we appreciate
13 the offer, but that's not something we're interested in
14 doing.

15 THE COURT: All right. Mr. Schuman, are you in
16 the same camp there?

17 MR. SCHUMAN: Yes, your Honor.

18 THE COURT: Okay. All right. So realistically
19 what I have in mind is picking the jury next Monday. What
20 I'm sort of thinking is that maybe it would make sense -- I
21 don't normally like to do this, but normally it would make
22 sense if we start the testimony on Tuesday or start the
23 openings on Tuesday.

24 MR. CANTINE: That's fine with us, your Honor.

25 THE COURT: I'm not surprised to hear you say

1 that. And the kind of schedule that I imagine is that we
2 would have trial on Tuesday, Wednesday, Friday, then into
3 next week. There's something else that's happening on
4 Thursday, so I think that's just going to be an off day for
5 this case.

6 And so that's what I'm planning, how I am
7 imagining the proceeding. And that will give some -- and,
8 of course, we've got Mr. Bratic coming in Friday afternoon,
9 and obviously I'm deciding what to do about his testimony.
10 It would be an extremely high priority once I've heard from
11 him.

12 Is there anything else?

13 MR. CANTINE: Nothing from me, your Honor.

14 THE COURT: Hold on a minute. Is there anything
15 else that either of you wants to talk about this morning?

16 MR. SCHUMAN: No, your Honor.

17 THE COURT: Mr. Cantine?

18 MR. CANTINE: No. I'm good. Thanks.

19 THE COURT: All right. Well, thank you.

20 And I guess I will hear from Mr. Schuman by the
21 end of tomorrow. And if nothing else, I will see you all on
22 Friday afternoon. All right?

23 MR. CANTINE: Thank you.

24 THE COURT: And for Friday afternoon, two
25 things, really, one of which is, I think we're starting at

1 2:00, I think.

2 MR. CANTINE: Correct.

3 THE COURT: I'd like to limit it to two hours,
4 maximum.

5 And in terms of Mr. Bratic's qualifications,
6 unless there's something particularly pertinent to this,
7 let's just give me his resume and get into, you know, why
8 his method of calculation is reliable.

9 MR. CANTINE: Understood, your Honor.

10 THE COURT: All right?

11 MR. CANTINE: Thank you.

12 THE COURT: All right. Well, thank you. We'll
13 stand in recess.

14 (Court recessed at 11:24 a.m.)

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